

Præsum 2 128

THE
DIALOGVE

in English, betweene
a Doctor of Diuinity, and
a Student in the Lawes
of England.

Newly corrected & Im-
printed, with new Addi-
tions.



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The first Dialogue in English,
betwixt a Doctor of Diuinity, and
a Student in the Lawes of England, of the
grounds of the said Lawes, and of conscience,
newly corrected, and enlargeth Imprinted
with new Additions.

¶ The Introduction.



Doctor of Diuinity that was of great acquaintāce & familiarity with a Student in the laws of England, sayd thus vnto him, I haue had great desire of

long time to know wherupon the law of England is groundēd, but because the most part of the law of England is written in the French tongue, therefore I cannot through mine owne study attaine to the knowledge therof: for in that tongue I am nothing expert. And because I haue found thee a faithfull freend to me in all my busineses, therefore I am bold to come to thee before any other to know thy minde, what be the very groundes of the Law of England as thou thinkest.

St. That would aske a great leasure, & it is also about my cūning to do it. Neuertheles, that thou shalt not thinke that I would wilfully refuse to fulfil thy desire: I shal with good wil do

A ij.

that

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that in me is to satisfie thy mind: But I pray thee that thou wilt first shew me somewhat of other lawes that pertaine most to this matter, & that Doctors treat of, how lawes haue begun, And the I wil gladly shew thee as me thinketh what be the grounds of the law of England. *Def.* I will with good will doe as thou sayest: Wherefore thou shalt vnderstand that Doctors treat of foure lawes, the which (as me seemeth) pertaine most to this matter. The first is the law eternal. The second is the Law of nature of reasonable creatures, the which as I haue heard say, is called by the that be learned in the Law of England, the Law of reason. The third is the law of God. The fourth is the Law of man. And therefore I will first treat of the Law eternall.

Of the Law eternall.

Cap. I.

LThe as there is in euery artificer a reason of such like things as are to be made by his craft: so likewise it becometh that in euery gouernour there be reason and a foresight, in governing of such things as shall be ordered & done by him, to them that he hath the gouernance of. And forasmuch as almighty God is the creator and maker of all creatures, to the which hee is compared as a workeman to his workes: and is also the gouernour of all deedes and moouings that be found in any creature: Therefore as the reason of the wisdom of GOD (in asmuch as creatures be created by him) is the reason and foresight

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light of all craftes and workes that haue been
or shal be, so the reason of the wisdom of God
knowing al things by wisdom made to a good
end, obtaineth the name & reason of a law, and
that is called the law eternall.

And this law eternall is called þe first law,
& it is well called the first, for it was befoze all
other lawes, and all other lawes be deriued of
it, whereupon Saint Augustine saith in his
1. booke of Free arbitrement, that in Temporal
lawes, nothing is righteous ne lawfull, but that
the people haue deriued to the out of the lawe
eternal: Wherefoze every mā hath right & title
to haue þe he hath righteously, of the right wise
iudgement of the first reason, which is the lawe
eternal. Sr. But how may this law eternall be
knowne? for as the Apostle wryteth in the fifth
Chapter of his first Epistle to the Corinthians,
Quæ sunt dei nemo scit, nisi spiritus dei. That
is to say, no man knoweth what is in God, but
the spirit of God: wherefoze it seemeth that hee
openeth his mouth against heauen, that attēp-
teth to know it. Doct. This lawe eternall no
man may know as it is in it selfe, but onelie
blessed soules that see God face to face. But al-
mighty God of his goodnesse sheweth of it as
much to his creatures as is necessary for them,
for els god should bind his creatures to a thing
impossible: which may in no wise bee thought
in him. Therfoze it is to be understood that 3.
maner of waies almighty god maketh this lawe
eternall known to his creatures reasonable.
First, by the light of naturall reason. Secondly
by heauenty reuelatiō. Thirde, by þe order of a

¶ iij.

¶ Prince

The first Chapter.

¶ Since of any other secondary gouernour that hath power to bind his subjects to a law.

And when the law eternal of the will of God is knowen to his creatures reasonable by the light of natural vnderstanding, or by the light of naturall reason, that is called the Law of reason: and when it is shewed by heauenly reuelation in such maner as hereafter shall appeare, then it is called the law of God. And when it is shewed vnto him by the order of a Prince or of any other secondary gouernour that hath a power to set a law vpon his subjects, then it is called the law of man, though originallly it be made of God. For lawes made by mā that hath receiued thereto power of God, be made by God. Therefore the said threelaws that is to say, the law of reason, the law of god, and the law of man, the which haue seuerall names after the maner as they be shewed to man, be called in God, one law eternall.

And this is the law of which it is written Prouerbiorum octauo, where it is said, Per me reges regnant, & legum conditores iusta discernunt. That is to say, by mee kings raigne, and makers of lawes discern the troth, and this sufficeth for this time of the law eternall.

¶ Of the law of reason, the which by doctors is called the law of nature of reasonable creatures.

Cap. 2.

¶ First it is to be vnderstood, that the Lawe of nature may be considered in two maners, that

that is to say: generally and specially: when it is considered generally, then it is referred to all creatures, aswell reasonable as unreasonable, for all unreasonable creatures live under a certaine rule to them given by nature necessary for them to the conservation of their being, but of this Lawe it is not our intent to treat at this time. The law of nature specially considered: which is also called the lawe of reason, pertaineth onely to creatures reasonable, that is man, which is created to the image of God.

And this Law ought to be kept aswell among Jewes, and Gentiles, as among Christian men, and this law is alway good and righteous, stirring & inclining a man to good, and abhorring euill: and as to the ordering of the deeds of man it is preferred before the lawe of God, and it is written in the heart of every man teaching him what is to be done, and what is to be fled, and because it is written in the heart, therefore it may not be put away, ne it is neuer changeable by no diuersitie of place ne time, and therefore against this law, prescription, statute, nor custome, may not preuaile, and if any be brought in against it, they be not prescriptions, Statutes, nor customes, but things hoide & against Justice, and all other lawes, aswell the lawes of God as to the actes of men, as other, be grounded thereupon.

Secu. With the law of reason is written in the heart of every man, as thou hast said before, teaching him what is to be done, & what is to be

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The second Chapter.

be fled, and the which thou saiest may neuer be put out of the heart, what needeth it then to haue any other Lawe brought in to order the actes and deedes of the people?

Do. Though the law of Reason may not be chaunged nor whole put away. Neuerthelesse before the law written it was greatly let and blinded by euill customes and by many sins of the people, beside our original sin. Insomuch that it might hardly be discerned what was righteous and what vnrighteous, & what was good and what euill. Wherefore it is necessary for good order of the people, to haue many things added to the Lawe of Reason, aswell by the Church, as by secular Princes, according to the manners of the country and of the people, where such additions should be exercised. And this law of reason differeth fro the law of God in two manners. For the law of God is given by reuelation of God, and this law is given by a natural light of vnderstanding. And also the law of God ordereth a man of it selfe by a right way to the felicity that euer shall endure. And the law of reason ordereth a man to the felicity of this life.

Sr. But what be the things that the law of reason teacheth to be done, and what to be fled, I pray thee shew me.

Doct. The law of reason teacheth that good is to be loued, and euill is to be fled. Also that thou shalt doe to another, that thou wouldest another should doe to thee. And that wee may doe nothing against truth. And that a man must liue peacefully with other. That Iustice

The second Chapter.

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Justice is to be done to every man, and also that wrong is not to be done to any man.

And that also a trespasser is worthy to be punished, and such other, of the which follow diuers other secondary commaundements, the which be as necessary conclusions deriued of the first. As of that commaundement that good is to be beloued, it followeth that a man shall loue his benefactor: for a benefactor in that he is a benefactor, includeth in him a reason of goodnes, for els he ought not to be called a benefactor, that is to say, a good doer, but an euill doer. And so in that he is a benefactor, he is to be beloued in all times, and in all places: And this law also suffereth many things to be done, as that it is lawfull to put away force with force. And that it is lawfull for every mā to defend him selfe and his good against an vnlawfull power. And this law runneth with every mans law, and also with the Law of God, as to the deeds of mā, and must be alwaies kept and obserued, and shall alway declare what ought to followe vpon the generall rules of the Lawe of man, and shall restrain them if they be any thing contrary vnto it.

And heere it is to be vnderstood, that after some men the Lawe whereby all things were in Common, was neuer of the Lawe of Reason, but onely in the time of extreame necessity. For they say that the Lawe of reason may not be chaunged, but they say it is euident that the Lawe whereby all things should be in common is chaunged, wherefore they
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conclude that was neuer the Lawe of Reason.

¶ Of the law of God.

Cap. 3.

The Law of God is a certaine law giuen by reuelation to a reasonable creature shewing him the will of God, willing that creatures reasonable bee bound to doe a thing, or not to do it, for obtaining of the felicity eternall. And it is said for the obtaining of the felicity eternall, to exclude the laws shewed by reuelation of God for the politickall rule of the people, the which be called Iudicials. For a law is not properly called the law of God, because it was shewed by reuelation of God, but also because it directed a mā by the neereſt way to the felicity eternall, as been the lawes of the olde Testament that been called Morall, and the lawes of the Euangelistes, the which were shewed in much more excellent manner, then the law of the old Testament was: for that was shewed by the mediation of an Angel: But the law of the Euangelistes was shewed by the mediation of our Lord Iesu Christ God and man, and the Law of God is alway righteous and iust, for it is made and giuen after the wil of God. And therefore all actes and deeds of man, be called righteous and iust, when they bee done according to the Law of God, and be comfortable to it. Also sometime a Lawe made by man is called the law

law of God. As when a Lawe taketh his principall ground vpon the law of God, and is made for the declaration or conseruation of the faith, and to put away Heresies, as diuers lawes Cannons, and also diuers lawes made by the cōmon people sometime doe. The which therefore are rather to be called the Law of God then the law of man. Yet neuerthelesse, all the Lawes Cannon be not the Lawes of God: for many of them be made onely for the politicall rule and conseruation of the people. Whereupon Iohn Gerson in the treatise of the Spirituall life of the Soule, the second Lesson, and the third Copozally, saith thus: All the Cannons of Bishops nor their decrees be not the Law of God: for many of them be made onely for the politicall conseruation of the people. And if any man will say: Be not all the goods of the Church spirituall, for they belong vnto the spirituatlie, and lead to the spirituatlie? We aunswere: That in the whole politicall conuersation of the people, there be some specially deputed and dedicate to the seruice of God, the which most specially (as by an excellencie) are called spirituall men, as religious men are. And other though they walke in the way of God, yet neuerthelesse, because their office is most specially to be occupied about such thinges as pertaine to the common wealth, and to the good order of the people, they be therefore called secular men or lay men. Neuerthelesse, the goodes of the first may no more be called Spirituall, then the goodes of the other, for they be things merere

The third Chapter.

temporall, and keeping the body as they do in the other. And by like reason Lawes made for the politicall order of the Church, be called many times spirituall or the Lawes of God. Nevertheless, it is but improperly. And other bee called Ciuill or the Lawes of man. And in this point many be oft times deceiued, and also deceiue other, the which iudge the things to be spirituall, the which all men know be things temporall and carnall. These be the wordes of Iohn Gerson in the place alleaged before. Furthermore, beside the lawe of reason and the lawe of man, it was necessary to haue the law of God, for foure reasons.

The first, because man is ordeined to \hat{e} end of the eternall felicity, the which exceedeth the proportion and faculty of mans power. Therefore it was necessary that beside the Lawe of reason and the law of man, he should bee directed to his end by a law made of God.

Secondly, forasmuch as for the vncertainty of mans iudgement, specially of things peculiar and seldome falling, it happened oft times to follow diuers iudgements of diuers men, and diuersities of Lawes, and therefore to the intent that a man without any doubt may know what he should doe, and what he should not do: It was necessary that he should bee directed in al his deeds by a law heauenly given by God, the which is so apparant, that no man may swerue from it, as is the law of God.

Thirdly, man may onely make a law of such things as hee may iudge vpon, and the iudgement of man may not be of inward things, but onely

only of outward things, and neuertheless it belongeth to perfection that a man bee well ordered in both, that is to say, aswell inward as outward. Therefore it was necessary to haue the Law of G O D, the which should order a man aswell of inward things as of outward things.

The fourth is, because as Saint Augustine saith in the first booke of free Arbitrement, the law of man may not punish all offences: for if all offences should bee punished, the common wealth should be hurt, as is of contracts. For it cannot be auoyded, but that as long as contracts be suffered, many offences shall follow thereby, & yet they be suffered for the common wealth. And therefore that no euill should be unpunished, it was necessary to haue the Lawe of God that should leaue no euill unpunished.

¶ Of the law of man.

Cap. 4.

The law of man (which sometime is called the law positive, is deriued by reason, as a thing which is necessarily & probably following of the law of reason, & of the law of God. And that is called probable in that it appeareth to many, and specially to wise men, to be true. And therefore in every law positive well made, is somewhat of the lawe of reason, and of the law of god. And to discerne the law of god & the law of reason frō the law positive, is very hard. And though it be hard, yet it is much

The fourth Chapter.

much necessary in euery morall doctrine, and in all lawes made for the common wealth. And that the law of man be iust and rightwise, two things be necessary, that is to say: wisdom and authoritie. Wisdom, that he may iudge after reason what is to be done for the Communitie, and what is expedient for a peaceable conuersation and necessary sustentation of them. Authoritie, that hee haue authoritie to make lawes, for the Law is deriued of Ligare, that is to say, to binde. But the sentence of a wise man doth not binde the Communitie, if hee haue no rule ouer them. Also to euery good law be required these properties, that is to say, that it be honest, rightwise, possible in it selfe, and after the custome of the countrie, convenient for the place and time, necessarie, profitable and also manifest, that it be not capitious by any darke sentence, ne mixt with any priuate wealth, but all made for the common wealth. And after Saint Bridget in the 4. booke in the hundred twenty nine chapter, Euery good law is ordained to the health of the soule, and to the fulfilling of the lawes of God, and to induce the people to the euill desires and to do good workes. Also the Cardinall of Camerer writeth, whatsoeuer is righteous in the law of Man, is righteous in the law of God. For euery mans Law must bee consonant to the Lawe of God. And therefore the Lawes of Princes, the commaundements of prelates, the statutes of communitie, ne yet the Ordinance of the Church is not righteous nor obligatorie, but it be consonant to the law of God. And

And of such a Law of man that is consonant to the Lawe of God, it appeareth who hath right to landes and goods, and who not: for whatsoever a man hath by such lawes of man, hee hath righteously. And whatsoever it had against such Lawes, is vnrighteouslie had.

For lawes of man not contrarie to the law of God, nor to the law of reason, must bee obserued in the law of the soule: and he that despiseth them, despiseth God, and resisteth god. And furthermore as Gratian saith, because euil men feare to offend for feare of paine. Therefore it was necessary that diuers paines should be ordeined for diuers offences, as Physicians ordeined diuers remedies for seuerall diseases. And such paines be ordeined by the makers of Lawes, after the necessity of the time, and after the disposition of the people. And though that law that ordeined such paines hath thereby a conformatie to the law of God, (for the law of God commaundeth that the people shal take away euill from among themselves) yet they belong not so much to the Law of GOD, but that other paines (standing the first principles) might bee ordeined and appointed therefore, that is the law that is called most properly the Law Positive, and the law of man.

And the Philosopher said in his third booke of his Ethikes that the intent of a maker of a law is to make the people good, and to bring them to vertue. And although I haue somewhat in a generall shewed thee whereupon the law of
Eng:

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England is groundēd. (For of necessity it must be groundēd of the said lawes, that is to say, of the law eternall, of the law of reason, and of the law of God.) Nevertheless, I pray thee shew me moze specially wherupon it is groundēd as thou thinkest, as thou before hast promised to doe.

Stu. I will with good will doe therein that lyeth in mee, for thou hast shewed mee a right, plaine, and straight way therto. Therfore thou shalt vnderstand that the lawe of England is groundēd vpon sixe principall groundes. First it is groundēd on the Law of Reason. Secondly, on the Law of God. Thirdly, on diuers generall Customes of the Realme. Fourthly, on diuers Principles & be called Maximes. Fifthly, on diuers particuler Customes. Sixthly, on diuers Statutes made in Parliamētes by the king, and by the Common Counsell of the Realme. Of which groundes I shall speake by order as they be rehearsed before. And first of the Law of Reason.

¶ Of the first ground of the Law of England.

Cap. 5.

The first ground of the law of England is the Law of Reason, wherof thou hast treated before in § 2. Chap. the which is kept in this Realme, as it is in all other Realmes, & as of necessity it must needs be (as thou hast said before,) Doct. But I would know what is called the law of Nature after the lawes of England,

England Sr. It is not vsed among them that be learned in the lawes of England to reason what thing is comanded or prohibited by the law of nature, & what not, but all the reasoning in that behalfe is vnder this maner. As whe any thing is grounded vpon the law of nature, they say, that reason will h such a thing be done, & if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. Doct. Then I pray thee shew me what they that be learned in the lawes of the realme hold to be commaunded or prohibited by the law of nature, vnder such termes and after such maner as is vsed among them that be learned in the said lawes.

Sr. There be put by the that be learned in the lawes of England two degrees of the lawe of Reason, that is to say, the law of reason primary, & the law of Reason secundary, by the law of reason Primary be prohibited in the Lawes of Englad murder (that is the death of him that is innocent) perjury, disceit, breaking of the peace, & many other like. And by the same law also it is lawfull for a man to defend himselfe against an vnjust power so he keepe due circumstance. And also if any promise be made by man as to the body, it is by the law of reason bothe in the lawes of England. The other is called the law of Secundary reason, the which is deuised into two branches, that is to say, into the lawes of a Secundary reason generall, and into a law of Secundary reason particuler. The law of a Secundary reason generall is grounded and deriued of the generall Lawe, or generall

The 5. Chapter.

custome of proprietie, whereby goods moueable & vnmoueable be brought into a certaine proprietie, so that euery man may know his owne thing. And by this braunch be prohibited in the lawes of England disseisins, trespassse in landes & goods, rescusse, theft, vnlawfull withholding of an other mans goods & such other. And by the same law it is a ground in the law of England that satisfaction must be made for a trespassse, and that restitution must bee made of such goodes as one man hath that belong to an other man, the debis must be paid, couenants fulfilled, and such other. And because disseisins, trespassse in landes and goods, theft, and other had not beene knowen, if the law of proprietie had not beene ordained: Therefore all things that be deriued by reason out of the said law of Property, be called the law of reason secundarie generall, for the lawe of Property is generally kept in all our countries.

The law of reason secundary particuler, is the law that is deriued vpon diuers Customes generall and particuler, & of diuers Maximes and Statutes ordained in this realme. And it is called the law of reason secundarie particuler, because the reason in that case is deriued of such a Law that is onely holden for Lawe in this Realme, and in none other realme.

Doct. I pray thee shew me some special case of such a lawe of Reason secundary particuler for an example. Sen. There is a law in England, which is a law of custome, that if a man take a Distresse lawfully, that he shall put it in pound ouert, there to remaine til hee bee satisfied

fled of that he distrained for. And then there-
 upon may bee asked this question, that if the
 beasts dye in pound for lacke of meate, at whose
 perill dye they, whether dye they at the perill of
 him that distrained, or of him that oweth the
 beasts? D. If the law bee as thou sayest and
 that a mā for a iust cause taketh a distresse, and
 putteth it in the pound Quert, and no Lawe
 compelleth him that distreinet to giue them
 meate, then it seemeth of reason that if the dys-
 tresse dye in pound for lacke of meate, that is
 dyed at the perill of him that oweth the beasts,
 and not of him that distrained, for in him that
 distrained there can be assigned no default, but
 in the other may be assigned a default, because
 the rent was unpaid. Stu. Thou hast giuen
 a true iudgement, and who hath taught thee to
 doe so, but reason deriued of the sayd generall
 custome. And the lawe is so full of such secun-
 dary reasons deriued out of the generall cus-
 tomes and Maximes of the realme, that some
 mē haue affirmed that al the law of the realm,
 is the law of reason. But that cannot bee pro-
 ued as me seemeth, as I haue partly shewed
 befoze and moze fully will shew after. And it
 is not much vsed in the lawes of England, to
 reason what law is grounded vpon the Lawe
 of the first reason Primary, or on the Lawe
 of reason secundarie, for they bee most com-
 monly openly knowen of them selves, but for
 the knowledge of the Lawe of reason secun-
 dary is greater difficultie, and therefore there-
 in dependeth much the maner and foyme of ar-
 guments in the lawes of England.

B 4.

And

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And it is to be noted that all the deriuing of Reason in the Law of England proceedeth of the first principals of the law, or of some thing that is deriued of them: and therefore no man may right wisely iudge ne groundly reason in the lawes of England, if he be ignozant in the first principals, Also all birdes, fowles, wilde beastes of forests and warren, & such other be excepted by the lawes of England out of the said general law and custome of property. For by the lawes of the realme no property may be of the in any person, vnielſe they be tame. Nevertheless the egges of Hawks, herons, or such other as build in the ground of any person, be adiudged by the said lawes to belong to him that oweth the ground.

¶ Of the second ground of the law of England.

Cap. 6.

The second ground of the law of England is the law of God, & therefore for punishment of the that offend against the Law of God, it is enquired in many courts in this realme, if any hold any opinions secretly or in any other maner against the true catholike faith. And also if any general custome were directly against the law of God, or if any statute were made directly against it: as it were ordeined that no almes should be given for no necessity, the custome & statute were void. Nevertheless the statute made in the xxij. yere of king Ed. 3. whereby it is ordeined that no man under paine of imprisonment shal giue any almes to any

any ballant beggers & may well labour, & they may so be compelled to labour for their living, is a good statute, for it obserueth the intent of the law of God. And also by authoritie of this law there is a ground in the laws of England that he that is Accursed shal maintaine no action in & kings court, except it be in very fewe cases, so & the same excommunication be certified before the kings iustices in such maner as the law of the Realme hath appointed, and by the authoritie also of this ground, the lawe of England admitteth the spirituall iurisdiction of Dismes & offerings. And of al other things that of right belong vnto it, and receiueith also al laws of the Church duly made, and that exceed not the power of them & made them. Inso much that in many cases it becometh the kings Iustices to iudge after the laws of the church. Do. How may that be, that the kings Iustices should iudge in the kings courts after the law of the church? for it seemeth that the Church should rather giue iudgment in such things as it may make lawes of, the the kings Iustices. St. That may bee done in many cases whereof I shal for an example put this case. If a writ of right of ward be brought of the bodie &c. And the tenant cōfessing the tenure, & the nonage of the infant, saith, that the infant was married in his auncessers daies &c. whereupon xij. men be swozne which giue this verdict, that the infant was married in the life of his auncellour, and that the woman in the life of his auncellour such a deuorce, wherupon sentence was giuen that they should bee deuorced, and that the

B us.

heire

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heire appealed, which hangeth yet vndiscussed
 praying the ayde of the Iustice to know whe-
 ther h infant in this case shalbe said married or
 no. In this case if the lawe of the Church be h
 the sayd sentence of Diuorçe standeth in his
 strength and vertue vntill it be adnulled vpon
 the said appeale: That the infant at the death
 of his ancestoz was vnmarried because h first
 mariage was adnulled by that diuorçe, and if
 the law of the church be that the sentence of the
 diuorçe standeth not in effect till it be affirmed
 vpon the said appeale, then is the infant yet
 married, so that the value of his mariage can-
 not belong vnto the Lord, and therfore in this
 case iudgement conditional shal be giuen &c. &
 in likewise the kinges Iustices in many other
 cases shall iudge after the law of the Church,
 like as the spirituall iudges must in many ca-
 ses, forme their iudgmēt after the kings lawes.
 D. How may that be, that the spirituall Iud-
 ges should iudge after the kings lawes. I pray
 thee shew mee some certaine case thereof. Sir.
 Though it be somewhat a digression from our
 first purpose, yet I will not withsay thy des-
 ire, but will with good will put thee a case or
 two thereof, that thou maist the better perceiue
 what I meane. If A. & B. haue goods iointly
 and A. by his last will bequeath his portion
 therein to C. & maketh the said B. his Execu-
 tor: & dyeth, and C. asketh the execution of this
 will in the spiritual court: In this case h Iud-
 ges there be bound to iudge that wil to be void,
 because it is void by the lawes of this realme,
 and likewise if a man bee Outlawed, and after
 by

by his will bequeath certayne goods to John at Shute, & make his executoys & die, the king seisseth the goods & after giueth the againe to the executoys, & after John at Shute sueth a ciuiton out of the spirituall court against the executoys, to haue execution of the will. In this case the iudges of the spirituall court must iudge it will to be void, as the law of the realme is that it is, and yet there is no such law of forfeiture of goods by outlawry in the spiritual law.

¶ Of the third ground of the Law of England.

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The third ground of the law of England standeth vpon diuers General customes of olde time vsed through all the realme which haue bin accepted & approued by our soveraigne lord the king & his progenitoys, & all his subiects, & because the said customes be neither against the law of God, nor the Lawe of reason, and haue bin alway taken to be good and necessarie for the common wealth of all the Realme. Therefore they haue obtained the strength of the law, insomuch that he that doth against them, doth against Justice, and these be the customes & properly be called the Common law, and it shall alway be determined by the Justices whether there bee any such general custome or not, and not by iij. men, and of these general customes and of certayne principles that be called Maximes which also take effect by the old custome of the Realme, (as shall appeare in the Chapter next following) dependeth most part of the lawe of this realme.

¶ Itt.

¶ And

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And therfore our soueraigne Lord the king at his Coronation among other things taken by a solemne Oath, that he shal cause al the customs of his Realme faithfully to be obserued. Do. I pray thee shew me some of these generall Customes. Sc. I will with good wil, & first I shal shew thee how the Custome of the Realme is the very ground of diuers Courtes in the realme, that is to say, of the Chauncery, of the R. bench, of the common place, and the Eschequer, the which be Courts of record, because none may sit as iudges in these courts but by the kings letters patents. And these courtes haue diuers authorities, whereof it is not to treat at this time. Other courts there be also only grounded by h custome of the realme, that bee of much lesse authority then the courtes before rehearsed. As in euery Shire within the realme, there is a court that is called the cosety, & an other that is called the Sherifs Tozne, and in euery manor is a court that is called a court Baron. And to euery faire & market is incident a Court that is called a Court of Hipowders. And though in some statutes is made mention sometime of the said courts, yet neuerthelesse of the first institution of the sayd courts, & that such courts should bee, there is no statute nor Lawe written in the Lawes of England. And so al the ground and beginning of h sayd courts depend vpon the custome of the realme, the which custome is of so high authority, that the sayd courtes ne their authorities may not be altered, ne their names changed without Parliamēt.

Also

Also by the olde custome of the Realme no man shall be taken, imprisoned, disseised, nor otherwise distrouted, but he be put to answer by the Law of the land, & this Custome is confirmed by the Statute of Magna charta cap. 26.

Also by the olde Custome of the Realme, all men great and small shall doe & receiue Justice in the kings Courts, and this custome is confirmed by the Statute of Marleb. c. 1.

Also by the old Custome of the Realme, the eldest sonne is onely heire to his aunce, and if there bee no sonnes but daughters, then all the daughters shal be heires. And so it is of Sisters and other kinswomen. And if there be neither sonne, daughter, brother, nor sister, the shall the inheritance descend to the next kinsman or kinswoman of the whole blood to him that had the inheritance, of how many degrees soeuer they be from him. And if there be no heire generall nor speciall, then the land shall escheat to the Lord of whom the land is holden.

Also by the old custome of the realme, lands shall neuer ascend, or descend, from the sonne to the father or mother, nor to any other auncestor in the right lyne, but it shall rather escheat to the Lord of the fee.

Also if any Alien haue a sonne that is an Alien, and after is made Denizen, and hath an other sonne and after purchaseth landes and dyeth, the yongest sonne shall inherit as heire, and not the eldest.

Also if there be three brethren, & the middelst brother purchase Landes and dyeth without heire of his body, the eldest brother shal inherit
as

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as heire to him, and not the younger brother.

Also if land in fee Simple descend to a mā by the part of his father, & he dyeth without heire of his body, then the inheritance shal descend to the next heire of the part of his father. And if there be no such heire of the part of his father, then if the father purchaseth the lands, it shal go to the next heire of the fathers mother, & not to the next heire of the sonnes mother, but it shal rather escheate to the Lord of the fee. But if a mā purchase lands to him & to his heires, & die without heire of his body, as is said before, the land shal descend to the next heire of the part of his father, if there be any, & if not, then to the next heire of the part of his mother.

Also the sonne purchaseth lands in fee, and dyeth without heire of his body, the land shal descend to his uncle, and shal not ascend to his father: But if the father have a sonne though it bee many yeeres after the death of the elder brother, yet that sonne shal put out his uncle, and shall enjoy the land as heire to his elder brother for ever.

Also by the custome of the realme, the childre that is borne before espousels is Bastard, and shal not inherite.

Also the Custome of the Realme is, that no manner of goods nor cattels real nor personal shal neuer go to the heire, but to the executors, or to the Ordinary, or administrators.

Also the husband shal have all the chattels personals that his wife had at the time of the espousels, or after, and also chattels real if hee overlive his wife: But if he sell or give away the

the chattels reals & dis, by that sale or gift the interest of the wife is determined, or els they shall remain to the wife if she overlive her husband. Also the husband shall have at the inheritance of his wife wherof he was seised in deed in the right of his wife during the espousels in fee, or in fee taile general, for terme of life, if he have any child by her to hold as tenant by the curtesie of England, & the wife shall have the third part of the inheritance of her husband wherof he was seised in deed or in law after the espousels ac. But in that case the wife at the death of her husband must be of the age of 9. yeare or above, or els she shall have no dowry. Doct. What if the husband at his death be within the age of nine yerres? S. I suppose she shall yet have her dower. Also the old law & Custome of the Realme is, that after the death of every tenant that holdeth his land by knights service, the Lord shall have the ward & marriage of the heire, til the heire come to the age of 21. yerres, & if the heire in that case be of full age at the death of his ancestor, then he shall pay to his lord his reliefe, which at the common Law was not certaine, but by the Statute of Mag. char. it is put in certain: that is to say, for every whole knights fee to pay C. s. and for a whole Barony to pay a C. marks for reliefe, & for a whole Eriedom to pay a C. li. and after the rate. And if the heire of such a tenant be a woman, & she at the death of her ancestor be within the age of 21. yerres, then by the common law she should have bin in ward only till 14. yere, but by the Statute of West. 1. in such case she shall be in ward till 16. yere.

And

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And if at the death of her auncestre she be of \bar{h} age of 14. yere or above, she shalbe out of ward though the lands be holden of the king, & then she shall pay reliefe as an heire male shall.

Also of lands holden in Socage, if the auncestre die, his heire being within the age of 14. yeres, the next friend of the heire to whom the inheritance may not disced shall haue the ward of his body and lands, till he shall come to the age of 14. yeres, and then hee may enter. And when the heire cometh to the age of xxi. yeres, then the garde in shall yeld him an accompt for the profits thereof by him receiued.

Also such an heire in socage for his reliefe shall double his rent to the Lord the yere following the death of his auncestre: As if his auncestre helde by xij. d. rent, the heire in the yere following shall pay the xij. d. for his rent, and other xij. d. for his reliefe, and the reliefe he must pay though he be within age at the death of his auncestre.

Also there is an old Law and Custome in this Realme, that a freehold by way of feoffment, gift, or lease, passeth not, without Livery of seisin be made by \bar{h} land according, though a deed of feoffment be thereof made and deliuered: But by way of surrender, partition, and exchange, a freehold may passe without livery.

Also if a man make a will of land wherof he is seised in his demesne as of fee, that will is void: but if it had staid in feoffees hand, it had bin good. And also in London such a will is good by \bar{h} customs of the City if it be inrolled.

Also a lease for term of yeres is but a chattel by

by the law, and therefore it may passe without any liury of seison: but otherwise it is of a state for terme of life for that it is a freehold in the law, and therefore liury must bee made or els the freehold passeth not.

Also by the old Custome of the realme, a mā may distrain for a rent seruice of cōmon right. And also for a rent reserved vpo a gift in taile, a lease for terme of life, of pces, & at will, & in such case the Lord may distreine the heastes of tenants, as soone as they come vpo the ground, but the heastes of strangers that come in but by maner of an escape, he may not distrein til they haue bin leuant & couchant vpon the ground: but for debt vpo an obligation, nor vpo a contract nor for accompt ne yet for arrerages of accompt, nor for no maner of trespassse, reparations, nor such other, no man may distreine.

Also by the old Custome of the realme al issues that shal be ioined betwixt party & partie in any court of recozd within the realme, except a fewe whereof it needeth not to treat at this time, must be tried by xij. free and lawfull mē of the visne that bee not of affinity to none of the parties. And in other courts that bee not of recozd, as in h court, court baron, hundred & such other like, they shall be tried by the Othe of the parties, & not otherwise, vnlesse the parties assent that it shall be tried by the homage. And it is to be noted that Lords, barons, & al piers of the Realme bee excepted out of such trials if they will, but if they will wilfully be swozne therein, some say it is no error. And they may if they will haue a writ out of the chancery directed

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rected to the shirife commaunding him that he shall not impanel them vpon no enquest.

And of this that is said befoze it appeareth that the customes aforesayd no; other like vnto them, whereof be very many in the lawes of England, canot be proued to haue the strength of a law onely by reason. For how may it be proued by reason that the eldest sonne shal onely inherite his father, & the yonger to haue no part, or that the husband shal haue the whole land for terme of his life as tenant by the curtesie in such maner as befoze appeareth, and that the wife shal haue onely the thirde part in the name of her dower, & that the husband shal haue al the goods of his wife as his owne, and that if her dye liuing the wife, that his executors shal haue the goods, and not the wife: all these and such other cannot be proued onely by reason that it should be so and no otherwise, although they be reasonable, and that with the custome therein vsed suffiseth in the Law, and a statute made against such generall customes ought to be obserued, because they be not increased by the law of reason.

Also the lawe of property is not the lawe of reason, but a lawe of custome. howbeit that it is kept, and is also right necessary to be kept in al realmes and among al people, and so it may be numbred among the generall customes of the realme, & it is to vnderstand that there is no statute that treateth of the beginning of the sayd customes, ne why they should be holden for lawe, and therefore after them that be learned in the lawes of the realme, the old custome of the realme

is the onely and sufficient authoritie to them in that behalfe, and I pray thee shew mee what Doctors hold therein, that is to say, whether a custome onely bee a sufficient authoritie of any law. Do. Doctors hold that a lawe grounded vpon a custome is the most surest Lawe, but this thou must alwaies vnderstand therewith that such a custome is neither contrary to the law of reason, nor to the law of God. And now I pray thee shew mee somewhat of the Maximes of the law of England whereof thou hast made mention before in the 4. Chapter. Sen. I wil with good will.

¶ Of the 4. ground of the law of England.
Cap. 8.

The 4. ground of the law of England standeth in diuers Principles that be called in the law, Maximes, the which haue bin alwaies taken for law in this realme, so that it is not lawfull for any that is learned to deny the: for every one of those Maximes is sufficient authoritie to himselfe. And which is a Maxime, and which not, shall alway be determined by the Judges, and not by 12. men. And it needeth not to assigne any reason, why they were first receiued for Maximes, for it sufficeth that they be not against the law of reason, nor the law of God, & that they haue alway bin taken for a law. And such Maximes be not only holden for law, but also other cases like vnto the, and all things that necessarily follow vpon the same, are to be reduced to ſ like law, & therefore most commonly there be assigned some reasons of
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consideration why such Maximes be reasonable, to the intent that other cases like may the more conveniently be applyed to the. And they be of the same strength and effect in the law as statutes be. And though the generall Custome of the realme be the strength & warrant of the said Maximes as they be of the generall Customes of the realme, yet because the said generall customes be in maner knowne throught the Realme aswell to them that bee vnlearned as learned, and may lightly be had & knowne, and that with little study. And the Maximes bee only knowne in the Kings Courts, or among them that take great study in the Law of the Realme, and among few other persons. Therefore they bee set in this writing for severall groundes, and hee that listeth may so accompt them, or if he will, he may take them for no ground, after his pleasure. Of which Maximes I shall hereafter shew thee part.

First there is a Maxime, that Escuage vncertaine maketh knights service.

Also there is another Maxime, that Escuage certaine maketh socage.

Also that he that holdeth by Castel gard, holdeth by knights service, but he holdeth not by Escuage. And that he that holdeth by xx. s. to the gard of a castel holdeth by socage.

Also there is a Maxime, that a Discent taketh away an entrie.

Also, that no Prescription in landes maketh a right.

Also, that a Prescription of rent and profits & prinder out of land, maketh a right.

Also

Also that the limitation of a prescription generally taken, is from the time that no mans minde runneth to the contrary.

Also that assignes may be made vpon landes giuen in fee, for terme of life, or for terme of yerres though no mention be made of assignes, and the same law is of a rent that is graunted, but otherwise it is of a warrantie and of a covenant.

Also that a condition to auoide a freehold cannot be pleaded without deed, but to auoid a gift of chattell it may bee pleaded without deed.

Also that a release or confirmation made by him that at the time of the release or confirmation made, had no right, is void in the law, though a right come to him after, except it bee with warrantie, and then it shall bar him of all right that hee shall haue after the warrantie made.

Also that a right or title of action that onely dependeth in action, cannot be giuen nor graunted to none other but onely to the tenant of the ground, or to him that hath the reuerſion or remainder of the same.

Also that in an action of debt vpon a contract, the defendante may wage his lawe, but otherwise it is vpon a lease of landes for terme of yerres or at will.

Also if that any exigent in case of felony bee awarded against a man: he hath thereby forthwith forfeited his goods to the king.

Also if the sonne bee attainted in the life of the father, and after he purchaseth his charter

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of pardon of the king, and after the father dyeth: In this case the land shall escheate to the Lord of the fee, inso much that though he haue a younger brother, yet the land shall not descend to him: for by the attainder of the elder brother the blood is corrupt, and the father, in law died without heire.

Also, if an Abbot or a Prior alien the lands of his house and dyeth, in this case, though his successor haue right to the lands, yet hee may not enter, but hee must take his action that is appointed him by law.

Also, there is a Maxime in the law, that if a villaine purchase lands and the Lord enter, he shall enjoy the land as his owne: but if the villaine alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steale goodes to the value of twelue pence or about, it is felonie, and he shall dye for it. And if it bee vnder the value of xij. pence, then it is but petite larceny, and he shall not dye for it, but shall be otherwise punished after the discretion of the Judges, except it bee taken from the Person, for if a man take any thing how little soeuer it bee from a mans person feloniously, it is called robbery & he shall dye for it.

Also, he that is arraigned vpon an Inditement of felonie shall bee admitted in fauour of life to challenge xxxvi. Jurours peremptorie: he, but if hee challenge any about the number, the lawe taketh him as one that hath refused the Lawe, because hee hath refused three whole enquests, and therefore he shall dye: but
with

with cause hee may challenge as many as hee hath cause of challenge to. And further it is to be understood, that such peremptory challenge shal not be admitted in appeale because it is at the suite of the partie.

Also, the land of every man is in the law enclosed from other, though it lye in the open field. And therefore if a man do a trespass therein, the writ shal be *Quare clausum fregit*.

Also the rentes, commons of pasture, of tithary, reuerfions, remainders, nor such other thinges which lye not in manuell occupation, may not bee giuen nor graunted to none other without writing.

Also that he that recouereth debt or damages in the Kinges Court by such an action wherein a *Capias* lay into the Proesse, may within a yeare after the recovery, haue a *Capias ad satisfaciendum* to take the body of the defendant, and to commit him to prison till hee haue payde the debt and damages: but if there lay no *Capias* in the first action, then the plaintiffe shal haue no *Capias ad satisfaciendum*, but must take a *Fieri facias*, or an *Elegit* within the yeare or a *Scire facias* after the yeare, or within the yeare if he will.

Also, if a release or confirmation be made to him, that at the time of the release made, had nothing in the land &c. The release or confirmation is holde, except in certaine cases, as to bouch, and certaine other which need not here to be remembred.

Also there is a Martine in the law of England, that the King may disseise no man, ne

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that no man may disseise the king, ne pull any reuerſion or remainder out of him.

Also the kinges excellency is so high in the law, that no freehold may be giuen to the king ne be deuerted from him, but by matter of Record.

Also there was sometime a Maxime and a law in England, that no man should haue a writ of right, but by speciall suit to the king, & for a fine to bee made in the Chauncerie for it. But these Maximes bee changed by þe Statute of Magna charta Cap. 16. where it is said thus. Nulli negabimus, nulli vendemus rectū vel iusticiam. And by the words Nulli negabimus, a man shall haue a writ of right of course in the Chauncerie without suing to the king for it. And by the words Nulli vendemus, he shall haue it without fine: & so many times the old Maximes of the law bee chaunged by statutes. Also though it bee reasonable that for the manyfold diuersities of actions that be in the Lawes of England, that there should be diuersities of Proces, as in the real actions after one maner and in personall actions after an other maner: Yet it cannot be proued meere by reason, that the same Proces ought to bee had and none other: for by Statute it might be altered. And so the ground of the said Proces is to bee referred onely to the Maximes and Customs of the Realme.

And I haue shewed thee these Maximes before rehearsed, not to the intent to shewe thee specially what is the cause of the law in them, for that would aske a great respite. But I haue

haue shewed them only to the intent that thou mayst perceiue that the said Maximes & other like, may bee conueniently fit for one of the grounds of the lawes of England. Moreover there be diuers causes, wherof I am in doubt whether they be onely Maximes of the Law, or that they be grounded vpon the law of reason, wherein I pray thee let mee heare thine opinion.

Do. I pray thee shew those cases that thou meanest, and I shall make thee answer therein as I shall see cause.

¶ Hereafter follow diuers cases, wherein the Student doubteth whether they be only Maximes of the Lawe, or that they be grounded vpon the Law of reason.

Cap. 9.

The Law of England is, if a man command another to do a trespassse, & he doth it, that the commaunder is a trespasser.

And I am in doubt whether that it be onely by a Maxime of the law, or that it be by the law of reason.

Also, I am in doubt vpon what Law it is grounded, that the accessory shall not be put to answer before the principall &c.

Also, the law is that if an Abbot buy a thing that cometh to the vse of the house, and dieth, that his successor shall be charged. And I am somewhat in doubt vpon what ground that

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law

The 9. Chapter.

law dependeth.

Also, that he y^e hath possessid of land though it be by disseisin hath right against al men, but against him that hath right.

Also, that if an actiō real bee sued against any man that hath nothing in the thing demanded, the writ shall abate at the common law.

Also, that the alienation of the tenant hanging the writ nor his entrie into religiō, or if he be made a knight, or if she be a woman & take an husband hanging the writ, that the Writ shall not abate.

Also, if land & rent that is going out of the same land, come into one mans hand of like estate, and like surty of title, the rent is extinct.

Also, if lande descend to him that hath right to the same land before, hee shall be remitted to his better title if he will.

Also, if two tytles be concurrant together, that the eldest title shall be preferred.

Also, that every man is bound to make recompence for such hurt as his beasts shal do in the cozne or grasse of his neighbour, though he know not that they were there.

Also, if the demandant or plaitiffe hanging his Writ, will enter into the thing demanded, his Writ shall abate. And it is many times very hard & of great difficulty to knowe what cases of the Law of England be grounded vpon the law of reason, and what vpon custome of the Realme, and though it bee hard to discusse it, it is very necessary to be knowen, for the knowledge of the perfect reason of the law,

law: & if any mā thinke that these cases before rehearsed be grounded vpon the law of reason, then he may referre them to the first ground of the law of England, which is the law of reason, wherof is made mention in the 1. Chapter. And if any man thinke that they bee grounded vpon the law of custome, then he may refer the to the Maximes of the law, which be assigned for the third ground of the Law of England, wherof mention is made in the 3. Chap. as before appeareth.

Do. But I pray thee shew me by what authority it is proued in the lawes of England, & the cases which thou hast put before in the viij. Chap. and such other which thou callest Maximes ought not to be denied, but ought to be taken as Maximes. For although they cannot bee proued by reason as thou agreeest thy selfe they cannot, they may as lightly be denied as affirmed, vnlesse there be some sufficient authority to approue them.

Sir. Many of the customes and Maximes of the Lawes of England bee knowen by the vse and the custome of the realme so apparantly that it needeth not to haue any Lawe written thereof. For what needeth it to haue any Lawe written that the eldest sonne shall inherit his father, or that all the daughters shall inherit together as one heire, if there bee no sonne: or that the husband shall haue the goods and chattels of his wife that she hath at the time of the espousels, or after: or that a bastard shall not inherit as heire, or the executors shall haue the disposition of all the goods of their

C iij.

their

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their testator: and if there be no executors that the Ordinary shall haue it, & the heire shall not meddle with the goods of his auncceller, but if any particuler customes help him.

The other Maxime & customes of the lawe that be not so openly knowen among the people may be knowen partly by the lawe of Reason and partly by the bookes of the laws of England called Yeares and Termes, and partly by diuers Recordez remaining in the R. Courtes and in his Treasory: and specially by a booke called the Register, & also by diuers Statutes, wherein many of the said Customes & Maximes be oft recited, as to a diligent Searcher, will euidently appeare.

¶ Of the fifth ground of the law of England.

Cap. 10.

The fifth ground of the Law of England standeth in diuers particuler customs used in diuers countiees, towne, cities, and Lordships in this realme, & which particuler customes, because they be not against the Law of reason nor the law of God, though they bee against the said generall Customes or Maximes of the law, yet neuerthelesse they stand in effect and be taken for law, but if it rise in question in the kings courtes, whether there be any such particuler custome or not, it shall be tryed by xij. men, and not by the iudges, except the same particuler custome bee of Recorde in the

the same Court. Of which particuler Customes, I haue hereafter noted some for an example.

First there is a custome in Kent that is called Gauekind, that all the byethren shal inherite together, as sisters at the common Law.

Also there is an other particuler Custome, that is called Burghenglish, where the yonger sonne shal inherite before the eldest, and that custome is in Nottingham.

Also there is a custome in the Citie of London, that freemen there, may by their testament enrouled, bequeath their landes that they bee seised of to whome they wil, except to Mortmaine. And if they be Citizens and freemen, that they may also bequeath their landes to Mortmaine.

Also in Gauekind, though the father bee hanged, the sonne shal inherite. For their custome is, the Father to the bough, the Sonne to the plough.

Also in some Countreies the wife shal haue the halfe of the husbands lands in the name of her dowry, as long as she liueth sole.

And in some country the husband shal haue the halfe of the inheritance of his wife, though he haue no issue by her.

Also in some Countrey an Infant when he is of age of x. yere may make a feoffment, and the feoffment good And in some Countrey when he can meat an elle of cloth.

¶ Of the sixth ground of the Law of England.

Cap.

The II. Chapter.

Cap. II.

The sixth ground of the Law of England standeth in diuers Statutes made by our Soueraigne Lord the king & his progenitors, & by the Lords spirituall & temporall, and the Commons in diuers Parliaments, in such cases where the law of reason, the law of God, Customes, Maximes, ne other grounds of the law seemed not to be sufficient to punish euill men, and to reward good men. And I remember not that I haue seene any other groundes of the Lawe of England but onely these that I haue before remembred. Furthermore it appeareth of that I haue sayd before, that oft times two or three grounds of the law of England must be ioined together, or that the plaintife can open & declare his right, as it may appeare by this example. If a man enter into an other mans land by force, and after maketh trespass for maintenance to defraud & plaintife from his action: In this case it appeareth that the said unlawfull entrie is prohibited by the Law of reason, but the plaintife shall recover treble damages, that is by reason of the statute made in the 8. yere of king H. 6. cap. 9. And that the damages shalbe cessid by xij. mē that is by the custome of the realme. And so in this case, three grounds of the law of England maintaine the plaintifes action.

And so it is in diuers other cases that neede not to be remembred now. And thus I make an end for this time, to speake any farther of & grounds of the law of England. D. I thanke the

thee for the great paine that thou hast taken therein. Nevertheless, forasmuch as it appeareth that thou hast said before, that the learned men of the Lawe of England pretend to verifie, that the Lawe of England will nothing do, ne attempt against the lawe of Reason, nor the Lawe of God, I pray thee aunswere mee to some Questions grounded vpon the Lawe of England, how as thou thinkest the Law may stand with reason or conscience in them.

St. But the case, and I shall make aunswere therein aswell as I can.

¶ The first question of the Doctor, of the Law of England and conscience.

Cap. 12.

I haue heard say, that if a man that is bound in an Obligation pay the money, but he taketh no acquittance, or if he take one and it happeneth him to leese it, that in that case he shall be compelled by the Lawes of England to pay the money againe. And how may it bee said then, that that Law standeth with reason and conscience: for as it is grounded vpon the Lawe of reason, that debtes ought of right to be payed, so it is grounded vpon the Lawe of reason (as mee seemeth) that when they bee payed, that he that payed them should bee discharged. Now, first thou must vnderstand that it is not the Lawe of England, that if a man that is bound in an Obligation pay the money without Acquittance, or if he

The 12. Chapter.

he take acquaintance and leese it, that therefore the Law determineth that he ought of right to pay the money eftsoones, for that law were both against reason and conscience. But though it is that there is a generall Maxime in the lawe of England, that in an action of debt sued by an Obligation, the defendant shall not plead that he oweth not the money, ne can in no wise discharge himselfe in that action, but hee haue acquittance or some other writing sufficient in the law, or some other thing like, witnessing that hee hath payed the money: and that is ordained by the Lawe to auoide a great inconuenience that els might happen to come to many people: that is to say, that euery man by a Nude parol, and by a bare Auerrement should auoid an Obligation. Wherfore to auoid that inconuenience the law hath ordeined, that as the defendant is charged by a sufficient writing, that so hee must be discharged by sufficient writing, or by some other thing of as high authority as the Obligation is. And though it may followe thereupon, that in some particular case a man by occasion of that generall Maxime may bee compelled to pay the money againe that he payed before: Yet neuerthelesse, no default can be thereof assigned in the Law. For like as makers of law take heede to such things as may oft fall, and do most hurt among the people, rather then to particular cases: So in likewise the generall grounds of the law of England heede more what is good for many, then what is good for one singular person onely. And because it should bee a hurt to many,

if

if an Obligation should bee so lightly avoided by word, therefore the Law specially preventeth that hurt vnder such maner as before appeareth. And yet intendeth not nor commaundeth not, that the money of, right ought to be payed againe, but setteth a generall rule which is good and necessary to al the people, and that euery man may well keepe without it bee through his owne default. And if such default happen in any person, whereby hee is without remedy at the common law, yet he may be holpen by a Subpena, and so he may in many other cases where conscience serueth for him, that were too long to rehearse now.

Do. But I pray thee shew mee vnder what maner a man may be holpen by conscience. And whether he shall be holpen in the same court or in an other. Sr. Because it cannot bee well declared where a man shall bee holpen by conscience & where not, but it bee first known what conscience is, therefore because it pertaineth to thee most properly, to treat of the nature and quality of conscience, therefore I pray thee that thou wilt make mee some briefe declaration of the nature and quality of conscience, & then I shall answer to thy question as well as I can. Do. I will with good will doe as thou sapest, and to the intent that thou maiest & better vnderstand that I shall say of conscience, I shall first shew thee what Sinceritis is, & then what reason is, & then what conscience is, and howe these thre differ among themselves, I shall somewhat touch.

¶ What

The 13. Cahpter.

¶ What Sinderesis is.

Cap. 13.

Sinderesis is a naturall pōwer of h̄ soule, set in the highest part thereof, moouing & stirring it to good, & abhorring euill. And therefore Sinderesis neuer sluneth nor erreth. And this Sinderesis our Lord put in man to the intent that the order of thinges should be obserued. For after Saint Dionsie, the wisdom of God toyneth the beginning of h̄ second thinges to the last of the first thinges: for Angell is of a nature to vnderstand without searching of reason, and to that nature mā is toyned to Sinderesis, the which Sinderesis may not wholly be extincted neyther in man, ne yet in damned soules. But neuerthelesse as to the vse and exercise thereof, it may be let for a time, eyther through the darknesse of ignorance, or for vndiscreete delectation, or for the hardnesse of obstinacie. First by the darknesse of ignorance Sinderesis may be let that it shall not murmur against euill, because hee beleueth euill to bee good, as it is in heretikes, the which whē they dye for the wickednes of their error, beleue that they dye for the vertie truth of the sayth. And by vndiscreete delectation, Sinderesis is sometime so ouerlapde, that remorse or gudge of conscience for that time can haue no place. For the hardnes of obstinacy Sinderesis is also let that it may not stirre to goodnesse, as it is in damned soules that be so obstinate in euill that

that they may neuer be inclined to good. And though Sinderelis may be sayd to that point extinct in damned soules, yet it may not bee sayd that it is fully extinct to all intentes. For they alway murmur against the euill of the paine that they suffer for sinne, and so it may not bee sayd that it is vniuersally, and to all intentes, and to all times extinct: and this Sinderelis is the beginning of all thinges that may bee learned by speculation or studie, and ministrerth the general grounds and principles thereof. And also of all thinges that are to bee done by man: an example of such thinges as may bee learned by speculation appeareth thus: Sinderelis saith that euery whole thing is more then any one part of the same thing, & that is a sure ground that neuer faileth. And an example of thinges that are to be done, or not to be done: as where Sinderelis saith no euill is to be done, but that goodnes is to be done and followed, and euill to be fled, and such other:

And therefore Sinderelis is called by some men, the Lawe of reason, for it ministrerth the principles of the law of reason, the which be in euery man by nature, in that he is a reasonable creature.

¶ Of reason.

Cap. 14.

When the first man Adam was created
hee receiued of God a double eye, that is
to

The 14. Chapter.

to say, an outward eye, whereby hee might see visible thinges, and know his bodily enemies and eschewe them. And an inward eye, that is the eye of reason, whereby he might see his spirituall enemies that fight against his soule and beware of them. And among all gifts that God gaue to man, this gift of reason is the most noblest, for thereby man p̄celleth all beastes, and is made like to the dignity of angels, discerning truth from falshood, and euil from good. Wherefore he goeth farre from the effect that he was made to when he taketh not heede to the truth, or when hee p̄ferreth euil before good.

And therefore after Doctors, reason is the power of the soule, that discerneth betweene good and euil, and betweene good & better, comparing the other: the which also sheweth vertues, toucheth good, and sheweth vices. And reason is called righteous and good, for it is confor[mable] to the will of GOD, and that the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because shee is deceiued with an Errour that might bee ouercome, or else through her pride or slouthfulnesse shee enquireth not for knowledge of the truth that ought to bee enquired. Also reason is deuided into two parts, that is to say, into the higher part and into the lower part.

The higher part hideth heauenly things & eternall, and reasoneth by heauenly Lawes or by heauenly reason what is to be done, & what

is not to be done, and what things God commaundeth, and what he prohibiteth. And this higher part of reason hath no regard to transitory things or temporal things, but that sometime as it were by maner of counsell, she bringeth forth heavenly reasons to order well temporal things. The lower part of reason worketh most to governe well temporall thinges, & she groundeth her reasons much vpon lawes of man, & vpon reason of man, whereby she concludeth that that is to be done, that is honest and expedient to the common wealth, or not to be done, that is not expedient to the Common wealth. And so that reason whereby I know God and such thinges as pertaine to God, belongeth to the highest part of reason. And the reason whereby I know creatures, belongeth to the lower part of reason. And though these two partes, that is to say, the higher part and the lower part be one in deed & essence, yet they differ by reason of their working and of their office as it is of one selfe eye, that sometime looketh vppward, and sometime downeward.

¶ Of Conscience.

Cap. 15.

This word Conscience, which in latin is called Cōscientia is compounded of this propositiō, cum, & is to say in english, with, and is this nowne Scientia, & is to say in English, knowledge, and so conscience is as much to say as knowledge of one thing with an other thing, & conscience so taken is nothing else but

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The 15. Chapter.

an applying of any sciēce or knowledg to some particular acte of man. And so conscience may sometime erre & sometime not erre. And of cōscience thus taken, doctors make many descriptions, whereof one Docto^r saith, that conscience is the law of our vnderstanding. Another, that conscience is an habite of the mind discerning betwixt good & euil. Another, that conscience is the iudgement of reason, iudging on the particular acts of mā: al which sayings agree in one effect (that is to say) that conscience is an actual applying of any cūning or knowledg to such things as be to be done, whereupon it followeth that bpō the most perfit knowledge of any law or cunning, & of the most perfit & most true applying of the same to any particular acte of mā followeth the most perfit. & most pure, & the most best conscience. And if there be default in knowing of the truth of such a lawe, or in the applying of the s^ae to particular acts, the therē bpō followeth an erro^r or default in cōscience, as it may appeare by this exāple. Sinderesis ministrereth a vniuersal principle that neuer erreth (that is to say) ^h an vnlawfull thing is not to be done. And the it might be taken by some mā that every oath is vnlawfull because the Lord saith, Mat. 5. Ye shal in no wise sweare: And yet he ^h by reason of the said wo^rds will hold that it is not lawfull in no case to sweare erreth in conscience, for he hath not the perfit knowledge and vnderstanding of the truth of the said gospel, no^r he reduceth not the saying of scripture, to other scriptures, in which it is granted that in some case an oath may be lawful, & the cause why

why conscience may so erre in the said case, & in other like, is because conscience is foymed of a certain proposition or questiō grounded particularly vpon vniuersal rules ordeined for such things as are to be done. And because a particular proposition is not knowen to himself, but must appere & be searched by a diligeēt search of a reason, therfoze in search & in the cōscience hē should be foymed therupon may happē to be error, & therupon it is said hē there is error in conscience, which error commeth ept̄er because he doth not assent to hē he ought to assent vnto, or els because his reasons wherby he doth referre one thing to another, is deceiued. For further declaration wherof it is to vnderstand hē error in cōscience commeth 7. maner of waies. First is through ignorance: & hē is when a mā knoweth not what he ought to do, & then he ought to aske counsel of thē hē he thinketh most expert in that science, whereupon his doubt riseth. And if he can haue no counsel thē he must wholly cōmit him to God, & he of his goodnes wil so order him that he wil saue him frō offence. The second is through negligence, as when a mā is negligent to search his owne conscience, or to enquire the truth of other. The 3. is through pride, as when he will not meeken himselfe, ne beleue them that be better & wiser then hee is. The fourth is through singularity as when a man followeth his owne wit, and will not cōfoyme himselfe to other, nor follow the good common waies of good men. The fifth is through an inordīnat affection to himselfe wherby hee maketh conscience to followe his desire

D 4.

and

The 15. Chapter.

and so he caused her go out of her right course. The 6. is through pusillanimitie whereby some person dyedeth oft times such things as of reason he ought not to dread. The 7. is through perplexitie, & this is when a man beleueth himselfe to be so set betwixt two sins that he thinketh it vnpossible, but that hee shall fall into the one, but a mā can neuer be so perplexed in deed but through an error in conscience, & if he will put away that error he shal be deliuered, therefore I pray thee that thou wilt alwaies haue a good conscience, and if thou haue so, thou shalt alwaies be mery, & if thine owne heart reprove thee not, thou shalt alwaies haue inward peace. The gladnes of rightwile mē is of God & in God, & their ioy is alwaies in truth and goodness. There be many diuersities of conscience, but there is none better then that, whereby a man truly knoweth himself. Many men know many great & high cunning things, & yet know not themselves, and truly he that knoweth not himselfe knoweth nothing wel. Also he hath a good & cleane conscience, that hath puritie and cleanes in his hart, truth in his word, & rightwisenes in his deed. And as a light is set in a lanterne that all that is in h house may be seene thereby, so almighty God hath set conscience in the mids of euery reasonable soule as a light wherby he may discern & know what he ought to do, & what he ought not to do. Therefore forasmuch as it behooueth thee to bee occupied in such things as pertain to the law: It is necessary that thou euer hold a pure & cleane conscience, specially in such things as concern restitution:

tion: for the sin is not forgiven but if the thing that is wrongfully taken be restored. And I counsell thee also if thou loue that is good, & fly that is euil, & that thou doe to another as thou wouldst should be done to thee, & that thou do nothing to other that thou wouldst not should be done to thee. That thou do nothing against truth, that thou liue peaceably with thy neighbor, and that thou do Justice to euery man as much as in thee is. And also that in euery general rule of the law, thou do obserue and keep equity: & if thou do thus, I trust the light of the lantern, & is thy conscience shall neuer be extincted. *Sc.* But I pray thee shew mee what is that equity if thou hast spoken of before, & that thou wouldst that I should keepe. *D.* I will with good will shew thee somewhat thereof.

¶ What is Equiry.

Cap. 16.

Equity is a right wisesnes if considereth all if particular circumstances of the deed, the which also is tempered to the sweetness of mercy. And such an equity must alway be obserued in euery law of man, & in euery generall rule thereof, & that knew he well, that said thus, laws couet to be ruled by equity. And the wise man saith, be not ouermuch rightwile: for if extreme rightwiseness is extreme wrong, as who saith: if thou take al that the words of if law giuerh thee, thou shalt sometime do against if law, & for if plainer declaration what equity is, thou shalt vnderstand that such the deedes and actes

D iii.

of

The 16. Chapter.

of men, for which lawes bin ordained, happen in diuers maners infinitely. It is not possible to make any generall rule of the law, but that it shall faile in some case, and therefore makers of lawes take heed to such things as may often come, & not to every particuler case, for they could not though they would. And therefore to follow the wordes of the Law were in some case both against iustice and the common welth, wherfore in some cases it is necessarie to leaue the wordes of the Law, and to follow that reason & iustice requireth, and to that intent equity is ordeined: that is to say, to temper and mitigate the rigor of the Lawe. And it is called also by some men *Epicaia*, the which is no other thing but an exception of the law of God or of that law of reason from the general rules of the law of man, where they by reason of their generality would in any particuler case iudge against the law of god, or the law of reason, the which exception is secretly vnderstood in every generall rule of every positive law. And so it appeareth that equity taketh not away the very right but onely that, that seemeth to be right by the generall wordes of the law: nor it is not ordained against that crueltie of the law, for the law in such case generally taken is good in himselfe, but equity followeth the Law in all particuler cases where right and Justice requireth, notwithstanding that general rule of the law be to the contrary: wherfore it appeareth that if any law were made by a man without any such exception expessed or implied, it were manifestly vnrasonable, & were not to bee suffered: for such cases might come

come that he that would obserue h law should
 breake both the law of God & the law of reas o .
 As if a man make a bow that he wil neuer eat
 white meat, and after it happeneth him to come
 there where he can get no other meat. In this
 case it behoueth him to breake his auow, for the
 particuler case is excepted secretly from his ge-
 nerall auow by his equity or Epitay, as it is
 said before. Also if a law were made in a Citie
 that no man vnder the paine of death should o-
 pen the gates of the Citie before the Sun ry-
 sing, yet if the citizens before that houre flying
 from their enemies come to the gates of the ci-
 ty, & one for sauing of the citizens openeth the
 gates before h houre appointed by the law, yet
 he offendeth not the law, for that case is excep-
 ted from the said generall law by equity as is
 said before: & so it appeareth that equity rather
 followeth the intent of the law, the h words of
 the law. And I suppose h there be in likewise
 some like equities grounded vpon the generall
 rules of the law of h realm. S. We verely, wher-
 of one is this, there is a general prohibition in
 the laws of Englā. that it shal not be lawfull
 to any mā to enter into the freehold of an other
 without authority of the owner or the Law:
 but yet it is excepted frō the said prohibitō by
 the law of reason, that if a man drive beas t s by
 the high way, & the beas t s happen to escape in-
 to the corne of his neighbour, & he to bring out
 his beas t s that they should doe no hurt gorth
 into the ground & fetterh out the beas t s, there
 he shall iustifie that entree into the ground by
 the Law. Also notwithstanding the Statute

D iij.

of

The 16. Chapter.

of Ed. 3. made the 14. yere of his raigne where-
 by it is ordeined that no man vpon paine of im-
 prisonment should giue any almes to any bali-
 ant begger, that is well able to laboꝝ: yet if a
 man meete with a balaunt begger in so cold a
 weather and so light apparel, that if he haue no
 cloths he shal not be able to come to any town
 to haue succour, but is likely rather to die by
 the way, and he therfoze giueih him apparel to
 saue his life, he shal be excused by the said Sta-
 tute by such an exception of the lawe of reason
 as I haue spoken of. Do. I know wel that as
 thou saist he shal be excepted of the said Statute
 by conscience, & ouer that, & he shall haue great
 reward of God foꝝ his good deed, but I would
 wit whether the party shal be so discharged in
 the cōmon law by such an exception of the law
 of reason oꝝ not, foꝝ though ignorance vnuinci-
 ble of a Statute excuse the party against god,
 yet (as I haue heard) it excuseth not in the
 lawes of the realme, ne yet Chancery, as some
 say, although the case bee so that the party to
 whome the forfaiture is giuen may not with
 conscience leaue it. S. Merely, by thy question
 thou hast put me in a great doubt, wherfoze I
 pray thee giue me a respite therein to make thee
 an answer, but as I suppose foꝝ & time (how:
 beit I will not fully affirme it to bee as I say)
 it should seeme that he should well plead it foꝝ
 his discharge at the common Law, because it
 shal be taken that it was the intent of the ma-
 kers of the Statute to except such cases. And &
 iudges may many times iudge after the minde
 of the makers as farre as the letter may suffer
 and

and so it seemeth they may in this case. And diuers other exceptions there bee also from other general grounds of the law of the Realme by such equity, as thou hast remembered before, that were too long to rehearse now. Doct. But yet I pray thee shew me shortly somewhat more of thy mind vnder what maner a man may bee holpen in this realme by such equity. S. I will with good will shew thee somewhat therein.

¶ In what maner a man shall be holpen by Equity in the lawes of England.

Cap. 17.

First it is to be vnderstood, there be in many cases diuers exceptions from ̄ general grounds of the law of the realme by other reasonable groundes of the same law, whereby a man shall be holpen in the common Law. As it is of this general ground, that it is not lawfull for any man to enter vpon a Discent, yet the reasonableness of the Law excepteth from the ground, an Infant that hath right, & hath suffered such a discent, & him also that maketh continuall claime, and suffereth them to enter, notwithstanding the discent. And of that exceptio they shal haue auantage in the cōmon law. And so it is likewise of diuers Statutes, as of the Statute whereby it is prohibited, that certain particuler tenāts shal do no waist, yet if a lease for terme of yeres be made to an infant that is within yeres of discretion, as of the age of v. or vi. yeres, & a stranger do waist, in this case this infant

The 18. Cahpter.

infant shall not be punished for the wast, for he is excepted & excused by the law of reason. And a woman couert to whom such a lease is made after the couerture shall be also discharged of wast after her husbands death by a reasonable Maxime & custome of the realme. And also for reparations to be made vpon the same ground it is lawfull for such particuler tenants to cut down trees vpon the same ground to make reparations. But the cause there as I suppose is, for that the minde of the makers of the sayd estatute, shalbe taken to be, that that case should be excepted. And in all these cases the parties shalbe holpen in the same court, & by the cōmon Law, & thus it appeareth that sometime a man may be excepted from the rigoz of a Maxime of the law by another Maxime of the Lawe. And sometime from the rigoz of a statute by the law of reason, and sometime by the intent of the makers of the statut: but yet it is to be vnderstood that most cōmonly, where any thing is excepted from the general customes or Maximes of the Lawes of the Realme by the law of reason the party must haue his remedy by a writ that is called Sub pena, if a Sub pena lye in the case. But where a sub pena lye, & where not, it is not our intent to treate of at this time. And in some case there is no remedy for such an equitie by way of compulsion, but all remedy therein must be cōmitted to the conscience of the party. Doct. But in case where a sub pena lye, to whom shal it be directed, whether to the iudge or the partie. Sc. It shal neuer be directed to the Judge, but to the party plaintife or to his attourney,

tourney, and thereupon an Iniunction commaunding them by the same vnder a certaine paine therein to be contained, that he proceed no further at the common Law, till it be determined in the Kinges Chauncerie, whether the platniffe hath title in conscience to recouer, or not. And when the plaintiffe by reason of such an Iniunction ceaseth to aske any farther processe. The Iudges will in like wise cease to make any further processe in that behalfe.

Do. Is there any mention made in the law of England of any such equities. Stu. Of this terme Equity to the intent that is spoken of heere, there is no mention made in the Law of England, but of an Equity deriued vpon certaine Statutes mention is made many times & often in the Law of England. But that equity is all of an other effect then this is: But of the effecte of this Equitie that we now speake of, mention is made many times, for it is oft times argued in the Lawe of England, where a Sub pena lyeth, and where not, and daile Willees bee made by men learned in the Lawe of the Realme, to haue Sub penas. And it is not prohibited by the Lawe, but that they may well doe it so that they make them not, but in case where they ought to be made, and not for vexation of the partie, but according to the truth of the matter. And the Law will in many cases that there shall be such remedie in the Chauncery vpon diuers things grounded vpon such Equities, and then the Lord Chauncellour must order his conscience after the rules and grounds of the Law of the realme,

in

The 18. Cahpter.

inſomuch that it had not been inconuenient to haue aſſigned ſuch remedy in the Chauncerie vpon ſuch equities for the ſeuē grounds of þ Law of England: but forasmuch as no recoꝝd remaineth in the kings Court of no ſuch bill, ne of the Writ of ſub pena oꝝ Iniunctiō that is ſued thereupon, therefore it is not ſet as for a ſpeciall ground of the law, but as a thing that is ſuffered by the law. D. Then ſeth the parties ought of right in many caſes to bee holpen in the Chauncery vpon ſuch equities. It ſeemeth that if it were ordeined by Statute, that there ſhould be no remedy vpon ſuch equities in the Chauncerie, noꝝ in none other place, but that euery matter ſhould bee ordeꝛed onely by the rules and grounds of the common Law, that the Statute were againſt right and conſcience. St. I thinke the ſame, but I ſuppoſe there is no ſuch Statute. Do. There is a Statute of þ effect, as I haue heard ſay, wherein I would glady heare thy opinion. Stu. Shew mee that Statute and I ſhall with good will ſay as me thinketh therein.

¶ Whether the Statute hereafter rehearſed by
the Doctoz be againſt conſcience
or not.

Cap. 18.

There is a Statute made in þ 4. yere of king
H. 4. cap. 22. ſo where by it is enacted, that
iudgement giuen in þ kings courts, ſhal
not be examined in the Chancery, Parliament,
noꝝ

nor elsewhere, by which Statute it appeareth that if any Judgement be given in the Kings courts against an equity or against any matter of conscience, that there can be had no remedie by that equity, for the iudgement cannot be reformed without examination, and the examination is by the said Statute prohibited, wherefore it seemeth that the said Statute is against conscience: what is thine opinion therein?

St. If iudgements giue in the kings courts should be examined in the Chancery before the kings counsell, or in any other place, the plain- tifes or demaundants should seldome come to the effect of their suit, ne the law should neuer haue end. And therefore to eschew that incon- uenience that Statute was made. And though peradventure by reason of \S Statute, some sin- gular person may happen to haue losse: Neuer- thelesse the said Statute is very necessary to es- chewe many great vexations and vniust ex- pences that would else come to many plain- tifes that haue rightwisely recovered in the kings Courts. And it is much moze provided for in the law of England \S hurt nor damages should not come to many, then only to one. And also the said Statute doth not prohibite equity, but it prohibiteith onely the examination of the iudgement for the eschewing of the inconueni- ence before rehearsed. And it seemeth that the said Statute standeth with good conscience: and in many other cases where a man doth wrong yet he shall not be compelled by way of compulsi- on to reforme it, for many times it must bee left to the conscience of the party, whether he will re-
dresse

The 19. Chapter.

redresse it or not. And in such case hee is in conscience aswell bound to redresse it if he will save his soule, as hee were if hee were compellable thereto by the law, as it may appeare in diuers cases that may be put vpon the same ground. Doc. I pray thee put some of these cases for an example. Sr. If the defendant wage his law in an action of debt brought vpon a true debt, the plaintiff hath no means to come to his debt by way of compulsion, neither by sub pena, nor otherwise, yet the defendant is bound in conscience to pay him. Also if the graund Jury in attaint affirme a false verdict given by the petty Jury, there is no further remedie but the Conscience of the partie. Also where there can bee had no sufficient prooffe, there can be no remedie in the Chancery, no more then there may bee in the spirituall Court. And because thou hast giuen an occasion to speake of conscience I would gladly heare thy opinion where conscience shal be ruled after the lawe, & where the law shal be ruled after conscience. D. And of that matter I would likewise gladly heare thy opinion, specially in cases grounded vpon the lawes of England, for I haue not heard but little thereof in time past, but before thou put any case thereof: I would that thou wouldest shew mee how these two questions after thy opinion are to be vnderstood.

¶ Of what Law this question is to bee vnderstood: that is to say, where conscience shal be ruled after the Law.

Cap. 19.

The

The law whereof mention is made in this question, that is to say : where conscience shalbe ruled by the lawe, is not as me seemeth to be vnderstood only of the law of reason, & of the law of god, but also of the law of mā, & is not contrary to the Law of reason, nor the law of God, but & it is superadded vnto them for the better ordering of the common wealth, for such a law of man is alwayes to be set as a rule in conscience, so that it is not lawfull for a man to frame it on the one side, ne on thother, for such a law of mā hath not only the strength of mans Law, but also the Lawe of reason, or of the Lawe of God, whereof it is deriued, for Lawes made by man, which haue receiued of God power to make Lawes, be made by God. And therfore conscience must be ordered by that law, as it must be vpon the law of god, & vpon the law of reason. And furthermoze the Lawe wherof mentiō is made in the latter end of the Chapter next before, that is to say, in the question wherein it is asked where the Law is to be left & forsaken for conscience, is not to be vnderstood of the law of reason, nor of the law of God: for the two Lawes may not be left, nor it is not to be vnderstood of the law of man that is made in particuler cases, and that is consonant to the law of reason, & to the law of God, and that yet that law should be left for conscience: for of such a law made by man, conscience must be ruled as it is said before : nor it is not to be vnderstood of a law made by mā commanding or prohibiting any thing to bee done that is against the law of reason, or the law of god.

f or

The 19. Chapter.

For if any law made by man, binde any person to any thing that is against the said laws, it is no law, but a corruption and a manifest error. Therefore after them that be learned in þe laws of England, the sayd question, that is to say, where the law is to bee left for conscience, and where not, is to be vnderstood in diuers manners, and after diuers rules as hereafter shal somewhat be touched.

First many vnlearned persons beleue that it is lawful for them to do with good conscience all things which if they do them, they shal not be punished therefore by the Lawe, though the Law doth not warrant them to doe that they do, but onely when it is done doth not for some reasonable consideration punish them that doth it, but leaueth it onely to his conscience. And therefore many persons doe oft times that they should not do, & keepe as their owne that, that in conscience they ought to reſtore. Wherefore there is the lawes of England in this case.

If two men haue a wood iointly, & the one of them selleth the wood, and keepeth all the money wholy to himselfe: In this case his fellow shal haue no remedy against him by law, for as they when they tooke the wood iointly, put each other in trust, and were contented to occupie together: so the Lawe suffereth them to order the profittes thereof according to the trust that each of them put thother in. And yet if one tooke all the profitts, hee is bound in conscience to reſtore the halfe to his fellowe, for as the Lawe giueth him right only to halfe the land, so it giueth him right onely in conscience

science to the halfe profits. And yet neuertheless it cannot be said in that case, that the lawe is against conscience, for the lawe neither wil leth ne cōmandeth that one should take all the profits, but leaueth it to their conscience, so that no default can be found in the lawe, but in him that taketh all the profits to himselfe may be assigned default, which is bound in cōscience to refoyme it, if he wil saue his soule, though he cannot be compelled thereto by the Law. And therefore in this case & other like that opinion which some haue, that they may do with conscience, all that they shall not bee punished for by the lawe if they doe it, it is to bee left for conscience: but the Lawe is not to bee left for conscience.

Also many men thinke that if a mā haue land that another hath title to, if he hath the right shall not by the action that is giuen him by the lawe to recouer his right by, recouer damages, that then he that hath the land is also discharged of damages in conscience, & that is a great error in conscience: for though he cannot be compelled to pay the damages by no mans lawe, yet he is compelled thereto by the Lawe of reason, & by the lawe of God, whereby we be bound to doe as we would bee done to, and that we should not couet our neighbors goods: & therefore if tenant in talle be disseised and the disseisor dyeth seised, and then the heire in the talle bringeth a Formedō & recouereth the land & no damages, for the lawe giueth him no damage in that case, yet the tenant by conscience is bound to pay damages to the heire in talle from the death

The 19. Chapter.

death of his auncester. Also it is taken by some men, that the lawe must bee left for conscience where the lawe doth not suffer a man to deny & he hath before affirmed in court of Record, or for & he hath wilfully excluded himselfe thereof for some other cause: as if the daughter that is onely heire to her father, wil sue liuery with her sister that is a bastard, in that case she shall not bee after receiued to say that her sister is a bastard, in so much that if her sister take halfe the land with her, there is no remedie against her by the Law. And no more there is of diuersitie in other estoppels, which were too long to rehearse now. And yet the party that may take advantage of such an estoppel by the lawe is bound in conscience to forsake that advantage, specially if he were so estopped by ignorance, & not by his own knowledge and assent. For though the lawe in such cases giueth no remedie to him that is estopped, yet the lawe iudgeth not that the other hath right vnto the thing that is in variance betwixt them. Also it is to be understood & the lawe is to be left for conscience, where a thing is tried and found by verdict against the truth, for in the common lawe the iudgment must bee giuen according as it is pleaded and tried, like as it is in other lawes, that the iudgment must bee giuen according to that, that is pleaded & proued. And it is to bee understood that the lawe is to be left for conscience, where the cause of the Lawe doth cease, for when the cause of the lawe doth cease, the lawe also doth cease in conscience, as appeareth by this case hereafter following.

A man maketh a lease for terme of life & after a stranger doth waſt, wherefore the leſſee bringeth an action of Treſpas, & hath iudgement to recouer damages, hauing regard to the treble damages that he ſhall peld to him in the reuerſion. And after he in the reuerſion beſore actiſ of waſt ſued, dieth: ſo that the action of waſt is hereby extincted, then the tenaunt for terme of life (though hee may ſue execution of the ſayde iudgement by the law) yet he may not doe it by conſcience, for in conſcience hee may take no more the he is hurted by the ſaid Treſpas, becauſe hee is not charged ouer with ſ treble damages to his leſſor. Alſo it is to be vnderſtood where a law is grounded vpon a preſumption, if the preſumption be vntrue, then the Law is not to be holden in conſcience. And now I haue ſhewed thee ſomewhat how the queſtion, that is to ſay, where the law ſhalbe ruled after conſcience. I pray thee ſhew me whether there bee not like diuerſities in other laws, betwixt law & conſcience. D. Yes verily very many, wherof thou haſt recited one beſore, where a thing that is vntrue is pleaded, and proued, in which caſe iudgement muſt be giuen according as wel in the law Ciuill, as in law Cannon. And an other caſe is, that if the heire make not his Inuentory, he ſhall be bound after the law Ciuill to all the debts though the goods amount not to ſo much. And the law Canon is not againſt that Lawe, and yet in conſcience the heire which in the lawes of England is called an Executour is not in that caſe charged to the debts, but according to the value of the goods.

E. q.

And

The 20. Chapter.

And nowe I pray thee shewe mee some cases
where conscience shall be ruled after the Lawe.
S. I will with good will shewe thee somewhat
as me thinketh therein.

¶ Heere followeth diuers cases where consci-
ence is to be ordred after the law.

Cap. 20.

The eldest sonne shall haue & inioy his fa-
thers landes at the cōmon law in consci-
ēce, as he shal in the law. And in Burgh-
english the younger son shall inioy the inheri-
tance, & that in conscience. And in Gauckind
all the sons shall inherite the land together as
daughters, at the cōmon law & in conscience.
And there cā be none other cause assigned why
cōscience in the first case is with the eldest bro-
ther, & in the second with the yonger brother, &
in the 3. case with al the brethren, but because in
law of England by reason of diuers customes
doth somtime giue the land wholly to the eldest
sonne, somtime to yongest, and sometime to all.
Also if a man of his meere motion make a feof-
femēt of two acres of land, lyng in two seuerall
shires, & maketh liuery of seisin in the one acre
in the name of both. In this case the feoffee
hath right but only in the acre whereof liuery
of seisin was made, because he hath no title by
the lawe : but if both acres had bin in one shire
he had had good right to both. And in these ca-
ses the diuersity of the law maketh the diuersi-
ty of conscience.

Also

Also, if a man of his mere motiō make a feffment of a Mannor & saith not to haue & to hold &c. with the appurtenances, in that case the feffee hath right to the demefne lands, and to the rents if there be attournments & to the commō pertaining to the Mannor, but hee hath neither right to the aduowsons appendant if any be, nor to þ villaines regardant, but if this term with thappurtenances, had bin in the deed, the feoffee had right in conscience aswell to the aduowsons and villaines, as to the residue of the Mannor: but if the king of his mere motiō giue a Mannor with thappurtenances, yet the donee hath neither right in law nor conscience to the aduowsons nor villaines. And the diuersity of the law in these cases maketh the diuersitie of conscience.

Also, if a man make a lease for terme of years pelding to him & to his heirs a certein rent upon condition, that if the rent be behinde by x. dates &c. that then it shalbe lawfull to the lessor & his heirs to reenter. And after the rent is behind, the lessor asketh the rent according to the law, & it is not payed, the lessor dyeth, his heire entreteth. In this case his entre is lawfull both in law and conscience, but if the lessor had dyed before he had demanded the rent, and his heire demanded the rent, & because it is not payed he reentreteth, in that case his reentree is not lawfull neither in law nor in conscience.

Also, if the tenāt in dower sow her land & dye before the coine is ripe, the coine in conscience belongeth to her executors, & not to him in the reuerſion: but otherwise it is in conscience of

— E iij.

grasse

The 20. Chapter.

grasse and fruits. And the diuersitie of the law maketh there also the diuersity in conscience.

Also, if a man seised of lands in his demesne, as of fee, bequeath the same by his last will to another & to his heires, & dyeth: In this case h̄ heire notwithstanding the will hath right to the land in conscience. And the reason is, because the law iudgeth that will to be void, & as it is void in the law, so is it void in conscience.

Also if a man grant a rent for terme of life & make a lease of land to h̄ same grantee for terme of life, & the tenant alieneth both in fee: In this case hee in the reuerſion hath good tytle to the land both in law and conscience, and not to the rent. And the reason is because the land by the alienation is forſaith by the law to him in the reuerſion and not the rent.

Also if landes be giuen to two men and to a woman in fee, & after one of the men entermarrieth with the woman, and alieneth the land & dyeth: In this case the woman hath right but onely to the thirde part, but if the man & the woman had been married together before the first feoffement, then the woman notwithstanding the alienation of her husband should haue had right in law & conscience to the one halfe of the land. And so in these two cases conscience doth follow the Lawe of the Realme. Also if a man haue two sons, one before espousels and another after espousels, and after the father dieth seised of certayne lands: In that case h̄ yonger sonne shall entoy the landes in this Realme as heire to his father both in law and conscience. And the cause is because that sonne boyn after espous

espousels, is by the Law of this realme the be-
 ry heire, and the elder son is a bastard. And of
 these cases and many other like in the lawes of
 England may be foirmed the Silogisme of cons-
 science oꝝ þ true iudgment of conscience in this
 manner. Sinderesis ministrerth the Maioꝝ thus:
 Rightwisenes is to be done to euery man, by
 on which Maioꝝ þ law of England ministrerth
 the minoꝝ thus. The inheritance belongeth to
 the son bozne after espousels, and not the son
 bozne befoze espousels, then conscience maketh
 the conclusion, & saith: therfoze the inheritance
 is in conscience to be giuen to the son bozne af-
 ter espousels. And so in other cases infinit may
 be foirmed by þ law of the Silogisme oꝝ the right
 iudgment of conscience: wherfoze they that be
 learned in the law of the realme say that in eue-
 ry case where any Law is oꝝdained for the dis-
 positio of lands & goods, which is not against
 the law of God, noꝝ yet against the law of rea-
 son, that the law bindeth al them that be vnder
 the Law of the Court of conscience, that is to
 say, inwardly in his soule. And therfoze it is
 somewhat to maruell that spirituall men haue
 not indeuoyed themselves in time past to haue
 moze knowledge of the kings lawes then they
 haue done, oꝝ that they yet doe, for by the igno-
 rance therof they be oft times ignorant of that
 that should oꝝder them according to right and
 Justice, as well concerning themselves as o-
 ther that come to them for Counsaile. And
 nowe forasmuch as I haue answered to
 thy questions as well as I can: I pray thee
 that thou wilt shew mee thy opinion in diuers

C. lxx.

cases

The 21. Chapter.

cases formed vpon the law of England where
in I am in doubt, what is to be holden therein
in conscience D. Shew me the questions & I
will say as me thinketh therein.

¶ The first question of the Student.

Cap. 21.

If an infant that is of the age of xxi. yeres, &
hath reason and wisdom to govern himselfe
sellerh his land, & with the money therof buy-
eth other land of greater value then the first
was and taketh the profits thereof, whether
may the infant aske his first land againe in con-
science, as he may by h. law. D. What thinkest
thou in that question? S. He seemeth that for-
asmuch as the law of England in this article
is grounded vpon a presumption, that is to say,
that infants commonly afore they be of the age
of xxi. yeres be not able to govern themselves,
that yet forasmuch as that presumption say-
eth in this infant that he may not in this case
with conscience aske the land againe that hee
hath sold to his great aduantage as before ap-
peareth. D. Is not this sale of the infant & the
seffement made therupon if any were, holdable
in the Law? S. Yes verely. D. And if the sef-
fee haue no right by the bargaine, nor by the
seffement made therupon, whereby should hee
then haue right thereto as thou thinkest. S. By
conscience as me thinketh, for the reason that
I haue made before. D. And vpon what lawe
should that conscience be grounded, that thou
spea-

speakest of, for it cannot be graunted by ^{the} law
 of the Realme, as thou hast said thy selfe. And
 mee thinketh that it cannot be grounded vpon
 the Law of God, nor vpon the Law of reason,
 for feoffments nor contracts be not ground-
 ed vpon neither of those lawes, but vpon the law
 of man. S. After the Lawe of property was or-
 detined, the people might not conueniently liue
 together without contracts, & therefore it see-
 meth that contracts be grounded vpon the law
 of reason, or at the least vpon the Law that is
 called Ius gentium, Doct. Though contractes
 bee grounded vpon the Law that is called Ius
 gentium, because they be so necessary and so ge-
 nerall among all people, yet that proueth not
 that contractes be grounded vpon the lawe of
 reason, for though the Law called Ius gentium
 be much necessary for the people, yet it may bee
 chaunged. And therefore if it were ordeined by
 statute that there should be no sale of land, ne
 no contract of goodes, and if any were, that it
 should be void, so that euery man should con-
 tinue still seised of his landes and possessed of
 his goodes, the statute were good. And then if
 a man against that statute sold his land for a
 summe of money, yet the seller might lawfullie
 retaine his land according to the statute. And
 then he were bound to no more but to repay the
 monney that he receiued with reasonable expen-
 ces in that behalfe. And so in likewise mee think-
 eth that in this case the infant may with good
 conscience reenter into his first land, because
 the contract after the Maximes of the Lawe
 of the Realme is void, for as I haue heard the
 Maximes

The 22. Chapter.

Maximes of the law be of as great strength in the Law as Statutes. And some thinke that in this case the infant is bound to no more, but only to repay the money to him that he sold his land vnto, with such reasonable costes & charges as he hath sustained by reason of the same. But if a man sel his land by a sufficient & lawfull contract, though there lacke livery of seisin or such other solempnities of the Lawe, yet the seller is bound in conscience to performe the contract. But in this case the contract is insufficient, and so me thinketh great diuerſitie betwixt the cases. *Sci.* For this time I holde me contented with thy opinion.

¶ The second question of the Student.

Cap. 22.

If a man that hath lands for terme of life be impanelled vpon an Inquest, & therupon leueth issues & dieth, whether may those issues be leuied vpon him in the reuerſion in conscience, as they may bee by the law? *D.* If they may bee leuied by the lawe, what is the cause why thou dost doubt whether they may be leuied by conscience. *S.* For there is a Maxime in the lawes of England, that where two Titles run together, the eldest title shall bee preferred. And in this case the title of him in the reuerſion, is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may bee lawfully leuied. *Do.* By that reason it seemeth thou art in doubt what the law is in this case,

case, but that must necessarily bee knowne, for
 els it were in vaine to argue what conscience
 wil therein. S. It is certain that the law is such,
 & so it is likewise if the husband forfeit issues,
 and die, those issues shal be leuied on the lands
 of the wife. D. And if the law be such, it seemeth
 that conscience is so in likewise, for although it is
 the law, that for execution of iustice every man
 shalbe impanelled when need requireth, it sees-
 meth reasonable, that if he will not appear that
 he should haue some punishment for his not ap-
 parance, for els the law should be cleere-ly frus-
 strate in that point. And the paine as I haue
 heard is that he shal loose issues to the king for
 his not apparance, wherefore it seemeth not
 inconuenient nor against conscience, though the
 law be that those issues shalbe leuied of him in
 the reuerſion, for that the condition was secret-
 ly vnderſtood in the law to passe with the lease
 when the lease was made. And therefore it is
 for the lessor to beware & to preuent the danger
 at the making of the lease, or els it shall be ad-
 iudged his owne default. And then this parti-
 cular Maxim whereby such issues shall be le-
 uied vpon him in the reuerſion is a particular
 exception in the law of England from the ge-
 nerall Maxim that thou hast remembred be-
 fore, that is to say, & where two tytles run to-
 gether, that the eldest title shalbe preferred, & so
 in this case the general Maxim in this point
 shall hold no place, neither in law, nor in consci-
 ence, for by this particular Maxim & strength
 of & general Maxim is restrained to every in-
 ſtent, & is to say, as well in law as in conscience.

The

The 23. Chapter.

The third question of the Student.

Cap. 23.

If a Tenant for terme of life, or for terme of
yeeres do wast, whereby they be bound by the
lawes to yeld to him in the reuerſio treble da-
mages, & so shal forſake the place waſted, whe-
ther is he also bound in conscience to pay those
damages, & to restore that place waſted imme-
diatly after the waſt done, as he is in the ſingle
damages, or that he is not bound thereto till
the treble damages, & place waſted, be recou-
red in the kings Court. D. Before iudgement
giuen in the treble damages & of the place waſ-
ted he is not bound in conscience to pay them,
for it is vncertaine what he should pay: But it
ſufficeth that he be ready till iudgement bee gi-
uen to yeld damages according to the value of
the waſt, but after the iudgement giuen, hee is
bound in conscience to yeld the treble dama-
ges, & also the place waſted. And the ſame law
is in all Statutes Penall, that is to ſay, that no
man is bound in conscience to pay the penaltie
till it be recovered by the law. S. Whether may
he that hath offended againſt ſuch a Statute Pen-
nal, defend the action and hinder the iudgment
to the intent hee would not pay the penaltie,
but onely ſingle damages. D. If the action be
taken right wiſely according to the Statute,
and vpon a iuſt cauſe, the defendant may in no
wiſe defend the action, vnleſſe he haue a true
dilatory matter to plead, which should bee
hurtfull to him if he pleaded not, though he bee
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not bound to pay the penaltie till it bee recouered.

¶ The fourth question of the Student.

Cap. 24.

If a man enfeoffe other in certeine land vpon condition that if hee enfeoffe any other, that it shalbe lawful for h̄ feoffor & his heires to reenter &c. whether is this condition good in conscience though it be void in the law? D. What is the cause why this condition is void in the law? S. The cause is this, by the law it is incident to every State of fee Simple, that he h̄ hath the estate, may lawfully by the law and by the gift of the feoffor, make a feoffment thereof. And then when h̄ feffor restraineth him after, that hee shall make no feoffment to no man against his owne former graunt, and also against the purty of the State of a fee Simple, the law iudgeth the condition to be void, but if the condition had bin, that he should not haue enfeoffed such a man, or such a man, that condition had bin good, for yet he might infeffe other.

D. Though the said condition be against the effect of the State of a fee Simple, & also against the law. Neuerthelesse it is not against the intent that the parties agreed vpon, & that at the time of the livery. And soasmuch as the intent of the party was, that if the feoffee infeffed any man of the land, that the feoffor should enter, and to that intent the feoffee tooke the State after

The 24. Chapter.

after break the intent, it seemeth that the lād in conscience should returne to the feoffor. S. The intent of the parties in the lawes of England is void in many cases, that is to say, if it be not ordred according to the law. And if a mā of his mere motion without any recompence intending to giue landes to another, & to his heires make a deed vnto him, where by he giueth him those lāds, to haue and to hold to him for euer, intending that by the word (for euer) the lessee should haue the land to him & to his heires, in this case his intent is void, and the other shall haue the land onely for terme of life. Also if a man giue landes to an other & to his heirs for terme of xx. yeares, intending that if the lessee die within the terme that then his heirs should enjoy the land during the terme: In this case his intent is void, for by the law of the realme al chattels real & personal shal go to the executors, & not to the heir. Also if a man giue landes to a man and to his wife, & to the third person, intending that every of them should take the third part of the land as three cōmon persons should, his intent is void, for the husband and the wife as one person in the law shal take onely the one halfe, & the third person & other half, but these cases be alway to be vnderstood wher the said estates bee made without any recompence. And forasmuch as in this principal case the intent of the feoffor is grounded against the Law, and that there is no recompence appointed for the feoffment, we thinketh that the feoffor hath neyther right to the lande by Lawe or conscience, for if he should haue it by

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conscience that conscience should bee grounded
 vpon the law of reason, and that it cannot, for
 conditions be not grounded vpon the Law of
 reason but vpon the Maximes & customs of the
 realme, & therefore it might be ordeined by Sta-
 tute that al conditions made vpon land should
 be void. And when a condition is void by the
 Maximes of the Law, it is as fully void to eu-
 uery intent, as if it were made void by statute,
 and so me thinketh that in this case the feoffor
 hath no right to the land in law nor in consci-
 ence. D. I am content the opinion stand til we
 shall haue hereafter a better leisure to speake
 farther in this matter.

¶ The fifth question of the
 Student.

Cap. 25.

If a fine with proclamation be leuted accor-
 ding to the statute, & no claime made within
 v-peres ec. whether is the right of a stranger
 extincted thereby in conscience, as it is in the
 law. Do. Upon what consideration was that
 statute made. Stu. That the right of lands and
 tenements might be the more certainly know-
 en, and not to be so vncertain as they were be-
 fore that statute. D. And when any law of man
 is made for a Common wealth, or for a good
 peace and quietnes of the people, or for any in-
 cōuenience or hurt to be saued from them, that
 law is good, though percase it extinct the right
 of a stranger, and must be kept in the Court of
 con-

The 25. Chapter.

conscience, for as it is said befoze in Ch. 4. By lawes rightwisely made by man, it appeareth who hath right to the lands & goods, for whatsoever a man hath by such a Lawe hee hath it rightwisely. And whatsoever hee holdeth against such a law hee holdeth vnrightwisely, & furthermoze it is said there, all the lawes made by man which be not contrary to the Lawe of God must be obserued & kept, and that in conscience. And he that despiseth the despiseth god, and he that resisteth them, resisteth God. Also it is to be vnderstood, & possessions & the right thereof is subiect to the Lawes, so that they therefore with a cause reasonable may be translated and altered from one man to another, by the act of the Law. And of this consideration that law is groundes, that by a contract made in faires and markets, the property is altered, except the property be to the King, so that the buier pay toll, or do such other things as is accustomed there to be done vpon such contracts, and that the buer knoweth not the former property. And in the law Cuill there is a like Law, that if a man haue another mans good with a title three peere, thinking that hee hath right to it, he hath & very right vnto the thing, and that was made for a law, to the intent that the propertie and right of things should not be vncertaine, and that variance and strife should not bee among the people. And so: as much as the said Statute was ordained to giue a certaintie of title in the landes and tenementes comprised in the fine: It seemeth that that fine extinguisht the title of all other, as well in cons

conscience as it doth in \S law And ſith I haue answered to the question: I pray thee let mee know thy mind in one question concerning tailed lands, and then I will trouble thee no further at this time.

¶ A question made by the Doctor, how certain reconeries that be vied in the kings Courts to defeat tailed land, may stand with conscience.

Cap. 26.

I haue heard ſay, \S when a man that is ſeiſed of landes in the taile ſelleth the land. That it is commonly vſed that he that buyeth the land ſhall for his ſurety, and for the auoyding of the Tayle in that behalfe, cauſe ſome of his friends to recover the ſaid lands againſt the ſaid tenant in taile: which recovery as I haue been credibly enformed ſhalbe had in this manner: the demaundantes ſhall ſuppoſe in their writ & declaration that the tenant hath no entre, but by ſuch a ſtranger as the buyer ſhal liſt to name & appoint, where in deed the demaundants neuer had poſſeſſion thereof nor yet the ſaid ſtranger. And thereupon the ſaid tenant in taile ſhall appeare in the court, and by aſſent of the parties, ſhall vouch to warrant one \S he knoweth well hath nothing to peeld in value. And the vouchee ſhal appere & the demaundants ſhal declare againſt him, and therupon he ſhal take a day to emparle at the ſame terme and at that day by aſſent and coun of the parties hee

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The 26. Chapter.

that make default, upon which default because it is a default in despite of the Court, the Demandants shall have iudgement to recouer against the tenant in taile, and he ouer in value against the vouchee, and this iudgement & recouery in value, is taken for a bar of the tale for ever, how may it therefore be taken that the law standeth with conscience, that as it seemeth alioverth & fauoureth such sayned recoveries? **St.** If the tenant in taile sell the land for a certaine summe of money as is agreed betwixt the at such a price as is commonlie vsed of other landes, and for the suertie of the sale suffereth such a recouerie as is aforesayd, what is the cause that mooueth thee to doubt whether the said contract or recovery made therupon, for the suertie of the buyer that hath truly payde his money for the same, should stand with conscience? **Do.** Two thinges cause mee to doubt therein, one is for that, that after our Lord had giue the land of Behest to Abraham and to his seed, that is to say, to his children in possession alway to continue, he sayd to Moyses as it appeareth **Leuit. 25.** the land shall not bee solde for ever, for it is mine. And then our Lord assigned a certain maner how the land might be redeemed in the yeare of Iubilie if it were solde before: and forasmuch as our Lord would that the land so giuen to Abraham and his children should not be sold for ever, it seemeth that he doth against the ensample of God, that alieneth or selleth the land that is giuen to him and to his children as lands entailed be giue. Another cause is this: it appeareth by the

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commaundement of GOD that thou shalt not couet the house of thy neyghbour &c. And if that concupiscence be prohibited, more stronger then the unlawfull taking and withholding thereof is prohibited: and so;asmuch as tyled land when the auncestor is dead, is a thing that of right is belonging to his heyre, for that he is heire according to the gift, how may the land with right of conscience be holden from him.

S. Notwithstanding the prohibition of Almighty GOD, whereby the Land that was giuen to Abraham & to his seed might not be aliened for ever, yet lands within walled towns might lawfully bee aliened for ever except the landes of the Leuites, as it appeareth in the sayd Chapter of Leuitic, 25. And so it appeareth that the said Prohibition was not generall for euery place and that among the Iewes. And it appeareth also that it was giuen onely to Abraham and his children, and so it was not generall to all people. And it appeareth also that it extended not but onely to the lande of promise as it appeareth by the words of the sayd Chapter, where it is sayd thus, all the region of your possession shall bee solde vnder the condition of redeeming, whereby appeareth that landes in other Countreyes bee not bounde to that condition, and as they bee not bound to that condition, by the same reason it followeth that they be not bounde to the same succession. Therefore that said Lawe that will that the lande giuen to Abraham & to his seed shall not bee sold for ever

¶ 4. bindeth

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bindeth no land out of the land of promission, & some men wil say, that sithen the passion of our Lord was promulgate and knowen, bindeth not there. And to the second reason which is grounden by the commandement of God: It must needs be granted that it is not lawful to any man unlawfully to couet the house of his neighbor, and that then moze stronger he may not unlawfully take it from him: but then it remaineth for thee yet to prooue howe in this case this tailed land that is solde by his auncester, and whereof a recovery is had recorded in the kings court, may be said the lands of the heire. D. That may be proued by the law of England, that is to say by the Statute of Westminster the second Ca. 1. where it is said thus. The will of the giuer expressely contayned in the deed of his gift, shalbe from henceforth obserued, so that they to whom the tenementes be so giuen shal not haue power to alien, but that the landes after their death shal remaine to the issue or retourne to the donour if the issue faile: By the which nature it appeareth evidently that though they to whom the tenements were so giuen, aliened them away, that yet neuertheless they in law and conscience by reason of the said Statute ought to remaine to their heires according to the gift, for it is holden commonly by all Doctours that the commandements and rules of the law of man or of a positive lawe that is lawfully made, bind all that be subiects to the law according to the minde of the maker, and that in the Court of conscience.

St.

St. Dost thou thinke that if a man offend against a Statut Penal that he offendeth in conscience? Admit that hee doe it not of a wilfull disobedience, or that he will not obey the law, for if hee doe it of disobedience, I thinke he offendeth. Do. If it be but onely a Statute that is called Populare, it bindeth not in conscience to the payment of the penalty, till it be recovered by the law. And then it doth bind in consciences but if a Statute be made principally to remedy the hurt of one party, and for that hurt it giueth a penaltie to the party, in that case the offender of the Statutes is bound immediately to restore the damages to the value of the hurt, as it is vpon the Statute of waste, but the penalty about the hurt hee is not bound to pay till iudgment be giuen as it is said before: but Statutes by which it is assigned who shall haue right or proprietie to these landes and tenements, or to these goods or cattels, if it be not against the law of God nor against the law of reason, binde all them that be subiect to the law in law and conscience, and such a Statute is the Statute of West 2. wherof we haue treated before, wherfore it must be obserued in conscience.

S. But some holde that the Statute of Westminster the second was made of a singularitie and presumption of many that were at the said Parliament for exalting and magnifying of their owne blood, and therefore they say that that Statute made by such a presumption bindeth not in conscience.

D. It is very perillous to iudge for certaine that

f. 17.

that

The 24. Chapter.

that the sayd Statute was made of such presumption as thou speakest of, for there bee many considerations to prooue that the sayd Statute was not made of such presumption, but rather of a very good minde of all the parliament, or at the least of the moze part thereof, and for the common wealth of al the realm, and first in the King the which in the sayde Parliament was the head and most chiefe and principall part of the Parliament (as hee is in euerie Parliament) cannot be noted to such intent. For it is not necessary nor it was not then in vse, that lands of the Crowne should be entailed, and in spirituall men ne yet in certayne Burghesses & Citizens of the said Parliament which at that time had no land, there can be noted no such singularitie, nor yet in the Noble men and Gentlemen nor such other as were of the sayd Parliament and had landes and tenements. It is not good to iudge in certayne that they did it of such a presumption, but it is good and expedient in this case as it is in other cases that bee in doubt to holde the surer way, and that is that it was made of charitie, to the intent that hee nor the heires of him to whom the lande was giuen should not fall into extreme pouertie, and thereby happely to run into offence against God: and though it were true as they say, that it was not made of charitie but of presumption and singularitye as they speake of: Nevertheless forasmuch as the Statute is not against the Law of God nor against the Law of Reason, it must be obserued by all them that bee subiectes vnto that Lawe,

Lawe. For as Iohn Gerson in the treatise that he entituled in latine, De vita spiritali animæ, the fourth lesson, and the third corollary: sayth, that God will that makers of Lawes Judge onely of outward thinges and reserue secret thinges to him. And so it appeareth that man may not Judge of the inwarde intent of the deede, but of such thinges as bee apparant and certaine, but it is not apparant that there was any such corrupt intent in the makers of the sayd Statute, how may it therefore bee said that that Law is good or rightwisse, that not only suffereth such thinges against the Statute, but also against the commaundement of God. St. To that some aunswere and say, that when the land is solde and a recovery is had thereupon in the Kinges Court of Record, that it sufficeth to barre the tale in consience, for they say that as the tale was first ordained by the Lawe, so they say that by the Lawe it is adnulled againe. D. Be thou thy selfe Judge if in that case there be like authoritie in the making of the tale, as there is in the adnulling thereof, for it was ordained by authoritie of Parliament, the which is alway taken for the most high Court in this Realm: before any other, and it is adnulled by a false supposell, for that, that they that bee named demaundantes should haue right to the land, where in truth they had neuer right thereto, whereupon follooweth a false supposel in the writ, and a false supposell in the declaration, and a vouchier to warrant by couin of such a person as hath nothing to geeld in value, and thereupon by couin

¶ uq.

and

The 26. Chapter.

and collusion of the parties followeth the default of the vouchee, by the which default the iudgment shalbe giuen. And so al the iudgment is deriued & grounded of the vntrue supposel & coun of the parties, whereby the Lawe of the realme & hath ordeined such a writ of Entre to help the that haue right to lands or tenements is defrauded, the court is deceiued, the heire is disherited, & as it is to doubt, the buyer and the seller, their heirs & assignes hauing knowledge of the taile bee bound to restitution, & verely I haue heard many times, that after the law of the Realme such recoveries should be no barre to the heire in the taile, if the law of the realme might be therein indifferently heard. S. I cannot see but that after the Law of the Realme it is a barre of the taile, for when the tenant in taile hath vouched to warranty, & the vouchee hath appeared & entred into the warranty, and after hath made default in despite of the court, wherupon iudgement is giuen for the demandant against the tenant, and for the tenant & he shal recouery in value against the vouchee, if & heire in the taile should after bring his Formedon & recouer the lands entailed, and after the vouchee purchaseth lands, then should the heire also haue execution against him to the value of the lands entailed as heire to his ancestor that was tenant in the first action, and so he should haue his owne lands, & also the landes recovered in value, & therfore because of the presumption that the vouchee may purchase landes after the iudgement, some be of opinion that it is in the law a good bar of the taile. D. I suppose that

that in that case thou hast put that the vouchee may barre the heire in taile of his recouerie in value, because he hath recovered the first lāds. Nevertheless I wil take a respite to be aduised of that recouery in value. And if thou can yet shew mee any other consideration why the said recoueries should stand with cōscience, I pray thee let mee heare thy conceit therein, for the multitude of the sayde recoueries is so great, that it were great pitty that al should be bound to restitution that haue landes by such recoueries, although there is none (as far as I can heare) disposed them to restore. S. Some men make an other reason to proue that the sayd recoueries should be sufficient by the law to auoid the statute of West, then and if they bee sufficient thereto, they be sufficient in cōscience. D. What is their reason therein? S. In the 7. yere of H. 8. ca. 4. among other things it is enacted, that all recouersers their heires and assignes may aduow and iustifie for rents, seruices, & customes by them recovered, as they against whom they recovered might haue done. And then they say that when the Parliament gaue to such recouersers authoritie to aduow and iustifie for such rentes, customes, and seruices as they recovered, that the intent of the Parliament was that such recouersers should haue right to that, for the which they should auow or iustifie, for els they say that it should be in vaine to giue them such power, & that the Parliament should els bee taken in maner as fortifiers of wrongfull title, and so they say that such recouersers by reason of the sayde Statute haue
right

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right by the law. D. That Statute as it seemeth
was made onelie to giue to the recouersers a
forme to auow and iustifie which they had not
before, though they had recouered bypon a good
title. And the cause why they had no forme to
auow or iustifie before the said Statute was,
forasmuch as the recouersers did not by the
pretence of the action affirme the possession
of him or them against whom they recouered,
nor claimes not by them, but rather disaffir-
med and destroyed the estate: And therefore
they cannot alleage any continuance of the
title by them, as they may that haue rentes or
seruices, or such other of the graunt of other
by deed or by fine. And therefore as it seemeth
the most principall intent of the Statute was,
that such recouersers should auow and iustifie
for rentes, seruices & customes, as they should
or might do that had them by fine, or deede, not
hauing any respect as it seemeth whether they
recouered against tenant in fee simple, or in fee
taile, nor whether the recouersers were had
bypon a rightfull title. And therefore as mes
seemeth the said Statute neither affirmeth nor
disaffirmeth the title of recoueries whereby
they doe aboue: For if a man had right before
the recouerie the right should remayne vnto
him notwithstanding the said Statute, and so
me seemeth that the title of them that haue the
lande intailed by such recoueries is nothing
fortified nor affirmed by the said statute, but
that they are in the same case as they were be-
fore, what thinkest thou therein? S. This matter
is great, for as thou sayest there bee so many
that

that haue tailed lands by such recoueries, that
 it were great pittie and heauinesse to condemne
 so many persons, & to iudge that they all were
 bound to restitution. For I thinke there bee
 but few in this realme that haue lands of any
 notable value, but that they or their ancestors,
 or some other by whom they claime, haue had
 part therof by such recoueries. Insomuch that
 Lords Spirituall and Temporall, Knights,
 Squires, rich men and poore, Monasteries,
 Colledges and Hospitals haue such lands, for
 such recoueries haue been vsed of long time,
 who may thinke therefore without geat hea-
 uinesse, that so many men should be bound to
 restitution, and that yet as thou saiest, no man
 disposeth him to make restitution. And so I
 am in maner perplexed and wot not what to
 say in this case, but that yet I trust that igno-
 rance may excuse many persons in this behalf.
 Do. Ignorance of the deede may excuse, but ig-
 norance of the Law excuseth not, but it bee in-
 uincible, that is to say, that they haue done that
 in them is to know the truth: as to counsaile
 toth learned men, and to aske them what the
 Lawe is in that behalfe, and if they aunswere
 them, that they may doe it is or that lawfully,
 then they be thereby excused in conscience. But
 yet in mans lawe they bee not thereby dischar-
 ged, but they that haue taken vpon them to
 haue knowledge of the Lawe, bee not excused
 by ignorance of the Lawe, ne no moze are they
 that haue a wilfull ignorance, and that would
 rather bee ignorant then to know the truth.
 And therefore they will not dispose them to
 aske

¶ The 26. Chapter.

aske any Counsaile in it, and if it be of a thing that is against the Law of God, or the Lawe of reason, no man shal be excused of ignorance, and so there bee but few that bee excused by ignorance. S. What then, shall wee condemne so many and so notable men. Doct. We shall not condemne them, but we shall shewe them their perill. Stu. Yet I trust their daunger is not so great that they should be bound to restitution. For Iohn Gerson saith in the said book called *De vnitatē Ecclesiastica, cōsideratione secunda, quod communis error facit ius*: that is to say, A common error maketh a right, of which words as it seemeth some trust may bee had, & though it were fully admitted the said recoveries were first had upon an vnlawful ground, and against the good order of conscience, that yet neuerthelesse, forasmuch as they haue beene vlsed of long time, so that they haue bin takē of diuers men that haue bin right well learned, in maner as for a lawe, that the buyers partlie be excused, so that they bee not bound to restitution. And moreover it is certaine that the Statute of Westminster the second, nor none other Statut made by man cannot be of greater valoz or strength, then was the bond of matrimony that was ordained of God. And though that bond of Matrimony was indissoluble, yet neuerthelesse Moyses suffred a bil of refusell of the Iewes, which in Latin is called *Libellū repudiij*, and so they might thereby forsake their wiues, as it appeareth Deutro, xxij. and therefore like as a dispensation was suffered against that bond, so it seemeth it may bee against

against this Statute. Do. As to that reason that thou hast last made of a bill of refusell, let all purchasers of land heare what our Lord saith in the Gospel of the Iewes, of that bill of refusall, Mathew 19. where hee saith thus, For the hardnes of your hearts Moises suffered you to leaue your wiues. For at the beginning it was not so: of which wordes Doctours hold commonly that though such a bill of refusell was lawfull so that they that refused their wiues thereby should be without paine in the law, yet it was neuer lawfull so that it should be without Anne. And so likewise it may be said in this case that such recoveries bee suffered for the hardnesse of the heartes of Englishmen, which desire land and possession with so great greedinesse that they cannot bee withdrawn from it neyther by the law of God nor of the Realme: And therfore the rich men should not take the possessions of poore men from them by power, without colour of title, that is to say, eyther by open Disseisin, or by the onely sale of the tenant in taile, and so to holde them against the expresse wordes of the Statute, such recoveries haue bin suffered. And though for the great multitude they may happely be without payne as to the Law of the Realme: yet it is to feare that they be not without offence, as against God, and as to the other reason, that a commo error should make a right, those wordes as me seemeth be to be thus vnderstood, that a custome vbled against the law of man shall be taken in some countries for Law, if the people be suffered so to continue. And yet some men call such
a cu-

The 26. Chapter.

a custome an error: because that the continuance of that custome against the law was partly an error in the people, for that they would not obey the Lawe that was made by their superiours to the contrary of that Custome, but it is to be vnderstood that the sayd recoveries though they haue beene long vsed, may not be taken to haue the strength of a custome, for many as well learned as vnlearned haue alway spoken against them and yet doe. And furthermore as I haue heard say a custome or a prescription in this Realme against the Statutes of the realme preuaile not in h^e law. S. Though a Custome in this Realme preuaileth not against a Statute as to the Law, yet it seemeth that it may preuaile against the Statute in conscience, for though ignorance of a Statute excuseth not in the Law, neuerthelesse it may excuse in conscience and so it seemeth that it may do of a custome. Doc. But if such recoveries cannot be brought into a lawfull custome in the lawe, it seemeth they may not be brought into a Custome in conscience, for conscience must alway be grounded vpon some Law, and in this case it cannot be grounded vpon the law of reason, nor vpon the Law of God, and therefore if the Lawe of man serue not, there is no ground whereupon conscience in this case may be grounded, and at the beginning of such recoveries they were taken to be good because the Law should warrant them to be good, and not by reason of any Custome, and so if the reason of the Lawe will not serue in the recoveries, the custome cannot helpe, for an euill Custome

is

is to be put away. And therefore me seemeth that the recoveries bee not without offence against **G O D**, though happily for their great multitude, and that there should not bee as it were a subuersion of the inheritance of many in this Realme, as well of spirituall as temporall, they bee without paine in the Lawe of the Realme, except such recoveries as by the common course of the Law bee voidable in the law by reason of some vse or of some other speciall matter: but what paine that is I will not timorously iudge, but commit it to the goodness of our Lord, whose Judgements be very deepe and profound, nor I will not fully asseuerie that they that haue landes by such recoveries ought to be compelled to restitution: but this seemeth to mee to bee good counsaile, that euery man hereafter hold that is certaine, and leaue that is vncertaine, and that is that hee keepe himselfe from such recoveries, and then hee shall be free from all scrupulousnes of conscience in that behalfe.

STU. It seemeth that in this question thou ponderest greatly the said Statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest that it must be holden in conscience, and ouer that as it seemeth thou art somewhat in doubt whether those recoveries bee any barre to the hette in the tayle by the law of the Realme, vnlesse that he haue in value in deede vpon the voucher, and that thou wilt thereupon take a respite or thou shew the full

The 27. Chapter.

full minde therein, and in likewise thou thinkest as I take it that those recoveries cannot be brought into a custome, but that the longer that they bee suffered to continue if they be not good by the Law, the greater is the offence against God. And therefore thou ponderest little that custome, but yet thou agreeest that it is good to spare the multitude of them that bee past, least a subuersion of h inheritance of many of this realm might follow, and great strife and variance also, if they should bee adnulled for the time past, except there be any other speciall cause to auoide them by the Law as thou hast touched in the last reason, but thou thinkest that it were good that fro henceforth such recoveries should bee cleerely prohibited, and not be suffered to be had in vse, as they haue bin before, and thou counsailest all men therefore to refraine themselves from such recoveries hereafter. Doct. Thou takest well that I haue said, and according as I haue ment it. S. Now I pray thee, sith I haue heard thy question of these recoveries according to thy desire, that thou wouldest aunswere me to some particuler questions concerning Tailed landes, whereof thou hast at this time giuen vs occasion to speake. D. Shew me these questions, & I will shew thee my minde therein with good will.

¶ The first question of the Student, concerning tailed lands.

Cap. 27.

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If a disseisor make a gift in fee to John a
 Sute, & J. at S. for the redeeming of the ti-
 tle of the disseisee, agreeth with him that hee
 shal haue a certain rent out of the same land to
 him & to his heires, & for the surety of the rent
 it is deuised that the disseisee shall release his
 right in the land &c. & that such a recovery as
 we haue spokē of before, shalbe had against the
 said Jo. at S. to the vse of the payment of the
 said rent and of the former taile, whether stand-
 deth that recoverie wel with conscience or not
 as thou thinkest? D. I suppose it doth, for it is
 made for the strength and suretie of the taile,
 which the disseisee might haue cleerly defeated
 & auoided if he would, & therefore as I thinke
 if the said J. at S. had granted to the disseisee,
 only by his deed a certaine rent for his releasing
 of his title, that graunt should haue bound the
 heires in the taile for ever. And then if the dis-
 seisee for his more surety will haue such a reco-
 uery, as before appeareth, it seemeth that reco-
 uery standeth with good conscience. S. It see-
 meth that thy opinto is right good in this mat-
 ter. And also it appeareth that with a reasona-
 ble cause, some particuler recoveries may stand
 both with law & conscience to barre a taile.

¶ The second question of the Student, con-
 cerning tayled lands.

Cap. 28.

If a Tenant in taile suffer a recovery against
 him of his landes entailed, to the extent that
 the

The 28. Chapter.

the recouerer shall stand seised thereof to the vse of a certayne woman whom hee intendeth to take to his wife, for terme of life, and after to the vse of the first Tayle, and after he marieth the same woman, whether standeth that recouerie with conscience, though other recoveries vpon bargaines and sales did not? Do. It seemeth yes, for though the Statute be that they to whom the tenements be so giuen, should not haue power to alien, but that the landes after their death should remaine to their issues, or reuert to the donours, if the issues failed: yet if hee to whom the landes were so giuen take a wife, and dyeth seised without heire of his body, and the donour enter, the woman shall recouer against him the third part to holde in the name of her dowry for terme of her life, though the tayle be determined, and the same lawe is of tenaunt by the Curtesse: that is to say, of him that happeneth to marry one that is an inheritor of the land entailed, and they haue issue, the wife dyeth, and the issue dyeth, he shall holde the landes for terme of his life, as tenant by the curtesse, notwithstanding the wordes of the Statute, which say that after the death of the tenant in taylor without issue, the landes shall reuert to the donour, and I thinke the cause is because the intent of that Statute shall not bee taken, that it is intended to put away such titles as the Lawe should giue, by reason of the Tayle, and so it seemeth that a like intent of the Statute shall be taken for Jointours, for else the Statute might be sometime a letting of Matrimony, and it is not like that the Statute intended

so, and therefore it seemeth that by the onelie
 dedde of the tenant in taylor, a Jointour may be
 made by the intent of the Statute, though the
 wordes of the Statute serue not expresse for it,
 for many times the intent of the letter shall be
 taken, and not the bare letter, as it appeareth
 in the same Statute, where it is said that hee
 to whom the lands be giue shall haue no power
 to alien, yet the same Statute is construed that
 neither he nor his heires of his body shall haue
 no power to alien, and so me thinketh that such
 an intent shall be taken here for sauing of Jointours.
 Sc. Truth it is, that sometime the intent
 of a Statute shall be taken farther then the expresse
 letter stretcheth, but yet there may no intent
 be taken against the expresse wordes of
 the Statute, for that should bee rather an interpretation
 of the Statute then an exposition, and it cannot
 bee reasonably taken, but that the intent of the
 makers of the sayd Statute was, that the land
 should remaine continually in the heires of the
 taile, as long as the taile endureth, and there
 can no Jointour bee made neither by dedde
 nor by recovery, but that the taylor must
 thereby be discontinued, and therefore this
 case of Jointour is not like to the said cases
 of Tenant in Dower, or Tenant by the Curtesle:
 for the title of Dower, and of Tenancie by the
 Curtesle groweth most specially by the continuance
 of the possession in the heires of the Taile, but
 it is no so of Jointours, and therefore by the
 onely dedde of the tenant in the Taylor, there
 may no Jointour bee lawfully made against the
 expresse wordes

The 29. Chapter.

of the Statute. And if there be any made by way of recovery, then it seemeth that it must bee put vnder the same rule, as other recoveries must be of lands entailed.

¶ The third question of the Student concerning tailed lands.

Cap. 29.

If John at Stoke being seised of lands in fee, of his mere motiō make a feoffment of certaine lands to thimself that the feoffees shall thereof make a gift to the sayd Jo. at Stoke to haue to him and to his heires of his body, and they make the gift according. And after the said J. at Stoke falleth into debt, wherefoze he is taken and put in prison, and thereupon for payment of his debts, he selleth the same land, and for suertie of the buyer he suffereth a recovery to bee had against him in such maner as befoze appeareth, whether standeth that recovery in conscience or not? Do. I would heere make a litle digressiō to aske thee another question or that I make answer to thine: that is to say, to feele thy minde how that Law by the which the body of the debto: shall be taken and cast into prison there to remain til he haue paid the debt, may stand with conscience, specially if he haue nothing to pay it with, for as it seemeth if he will relinquish his goods which in some laws is called in latin Cedere bonis, that hee shall not bee imprisoned, and that is to be vnderstood most specially if he be fallen into pouerty

pouerty and not through his owne default.
 S. There is no law in this realme that the de-
 fendant may in any case Cedere bonis, & as me
 seemeth if there were such a Law, it should not
 be indifferent, for as to the knowledge of him
 that the money is owing to, the debtoz might
 Cedere bonis, & is to say, relinquish his goods,
 and yet retaine to himselfe secretly great ri-
 ches. And therefore that Law in such case see-
 meth more indifferent and righteous that com-
 mitterh such a debtour to the conscience of the
 plaintife to whom the money is owing, then
 the committing him to the conscience of him
 that is the debtour: for in the debtoz some de-
 fault may bee assigned, but in him to whom the
 mony is owing may be assigned no default. D.
 But if hee to whom the debt is owing, knows
 eth that the debtour hath nothing to pay the
 debt with, and that hee is fallen into pover-
 ty by some casualty, and not through his owne
 default, doth the law of England hold, that he
 may with good conscience keep the debtoz still
 in prison till he bee pated? S. May hereby, but it
 thinketh more reasonable to appoint the liber-
 ty and the iudgement of conscience in that case
 to the debtee then to the debtour, for the cause
 before rehearsed. And then the debtour, if hee
 knew the truth, is (as thou hast said) bound in
 conscience to let him goe at liberty though hee
 bee not compellable thereto by the Law. And
 therefore admitting it for this time, that the
 law of England in this point is good and iust,
 I pray thee that thou wilt make aunswere to
 my question. D. I will with good will, and
 there

The 29. Chapter.

therfore as me seemeth, forasmuch as it appeareth that the said gift was made of the meere liberty and freewill of the sayd John at Hoke, and without any recompence, that therfore it cannot bee otherwise taken, but that the intent of the sayd J. at Hoke, aswell at the time of the sayd feoffment, as at the time that hee receiued againe the said gift in the tale, was, that if he happened afterwards to fall into pouerty, that hee might alien the said land to reueue him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he wil forget himselfe: and so it seemeth that not onely the said recovery standeth with conscience, but also if he had made onely a feoffment of the land, the feoffment should be in conscience a good barre of the tale, but if the said feoffment and gift had bin made in consideration of any recompence of money or for any matrimony or such other, then the feoffment of the said J. at H. should not bind his heire, & if he then suffered any recovery therof, then the recovery should bee of like effect as other recoveries wherof we haue treated before. and that which I sayd it was good to fauour rather for their multitude, then for the conscience: and the same law is that if the son and the heire of the said J. at Hoke in case that the sayd gift was made without recompence, alien the land for pouerty after the death of his father, the recovery bindeth not but as other recoveries doe, for it cannot bee thought that the intent of the father was, that any of his heirs in tale should for any necessity disherite all other heires in tale

taile that should come after him, but for himself mee thinketh it is reasonable to Judge in such maner as I haue sayd before. *St.* And though the intent of the sayd *John at Stoke*, when hee made the said feoffment, and when he tooke againe the said gift in taile, were that if he fel in neede that he might alien, yet I suppose that hee may not alien though percase for the more suerty hee declared his intent to bee such vpon the liuery of seisin: for that intent was contrary to the gift that he freely took vpon him, and when any intent or condition is declared or reserved against the state that any man maketh or excepteth: then such an intent or condition is void by the lawe, as by a case that hereafter followeth will appeare, that is to say. If a man make a feoffment in fee, vpon condition that the feoffee shall not alien to any man, that condition is void, for it is incident to every state of the fee simple that he is so seised may alien. And like as in a fee simple there is incident a power to alien, so in a state taile there is a secret intent vnderstood in the gift, that no alienation shall be made. And therfore though the intent of the said *Jo. at St.* were that if he fell into pouerty that he might sell, and though hee at the taking of the gift openly declared his intent to be so, yet the intent should be void by the law as me seemeth, and if it be void by the law, it is also void in conscience, and so the said recovery must be taken in this case to bee of the same effect, as recoveries of other lands intailed be, and in no other maner.

The 30. Chapter.

¶ The fourth question of the Student, concerning Recoveries of Enheritances intailed,

Cap. 30.

If an Annuity be graunted to a man to haue
e to perceiue to the grantee, & to the heires of
his body, of the cofers of his grantor. And
after the grantee suffereth a recovery against
him in a writ of Entree, by the name of a rent in
dale of like summe as the Annuity is of, with
vouchers & iudgment after the common course,
and both parties intend that the Annuity shal
be recovered: whether shall the recovery binde
the heire in taile of his Annuity? D. What if it
were a rent going out of land, what effecte
should the recovery bee then? Stu. It should be
then of like effect as if it were of land. Do. And
so it seemeth to be of this Annuity, for as mee
thinketh, a rent, and Annuity bee of one effect,
for the one of them shal be paid in ready money
as the other shall. Stu. Truth, and yet there be
many great diuersities betwixt them in the
law. D. I pray thee shew me some of those di
uersities. Stu. Part I shall shewe thee, but I
wotte not whether I can shewe thee all, but
first thou shalt vnderstand that one diuersity is
this. Every Rent, bee it Rent seruite, Rent
charge, or Rent secke, is going out of land, but
an Annuity goeth not out of any land, but
chargeth onely the person, that is to say, the
grantor, or his heires that haue Assets by
descend, or the house if it bee graunted by a
house

house of Religion to perceiue of their coffers. Also of an Annuity there lyeth no action, but onely a Writ of Annuity against the grantour, his heires, or successours, and that Writ of Annuity lyeth neuer against the perrour, but onely against the grantor or his heires: but of a rent, the same action may lye, as doe of land as the case requirerh, and it lyeth sometime of rent against the perrour of the rent, that is to say, against him that taketh the rent wrongfully, & sometime against neither. As of a rent seruice Alsise may lye for the Lord against the Mesne & the Disseisor, or sometime against the Mesne onely, if he did also the disseisin. Also an Annuity is neuer taken for an Ills, because it is no freeholde in the Law, ne it shall not be put in execution vpon a Statute Merchant, Statute Staple, ne Elegit, as a rent may. And because the saide Writ of Entre lay not in this case of this annuity, & that it cannot be intended in the law to be the same Annuity, though it be of like summe with the annuity, ne though the parties assented and ment to haue the same annuity recovered by the said Writ of Entre, therefore the said recouerie is hold in law and conscience. But if such a recouery bee had of rent with a voucher ouer, then it shal be taken to be of like effect, as recoueries of lands be in such maner as we haue treated of before.

- ¶ The fifth question of the Student concerning rayled lands.

Cap.

The 3 I. Chapter.

Cap. 31.

If lands be given to a man and to his Wife in the name of her Jointoy, by the father of the husband, to have and to hold to them & to the heires of their two bodyes begotten, and after they haue issue and the husband dieth, and the wife alieneth the land, & against the statute of 11. H. 7. suffreth a recovery thereof to be had against her, to the vse of the buier, and after her sonne & heire apparant that is heire to the taile releaseth to the reconerees by fine, & dyeth, hauing a brother a liue, & after the mother dieth, who hath right to the land, the buyer, or the brother of him that released? D. What is thine opinion therein, I pray thee shew mee. S. It seemeth that the buier hath right, for by the said statute made in 11. yeere of H. 7. among other thinges it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Ancestors of the husband suffer any recoverie thereof against her by co:uin, that then such recovery shalbe void, & that it shall be lawfull to him that should haue the land after the death of the woman to enter, and it to hold as in his first right, provided alway that that statute shall not extend where he that should haue the land after the death of the woman is agreeable to any such alienation or recovery, so that the agreement be of record. And forasmuch as the heire in this case agreed to 11. said recovery & fine, which is one of the highest Records in the lawe, it seemeth that the buyer hath right against that heire that agreed, and
against

against all that shall be heire of the taylor, and that not onely by the said recouerie, but also by the said Statute, whereby the said recouerie with assent of the heire is affirmed. D. Though the buyer in this case haue right during the life of the heire that released, yet neuerthelesse, after his death his heire as it seemeth may lawfully enter: for the agreement whereof the Statute speaketh, must as I suppose either be had before the recouerie, or else at the time of the recovery: For if a title by reason of the said Statute be once deuolute to the heire in the taylor, then the right as me seemeth cannot bee extinct nor put away by the onely fine of the heire, no more then if he had dyed, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the taylor, nor the right of Entree that is giuen by the Statute, and so as me seemeth, his next heire may therefore enter. S. As I perceiue all the doubt is in this case, because the assent of the heire was after the recouerie, for if it had bin at the time of the recouerie, as if the heire had bin bouched to warrant in the same recouerie, and hee had entred, and thereupon the iudgement had been giuen, thou agreeest wel, that the recovery should haue auoided the taylor for cuer.

Doctour. That is true, for it is in expresse wordes of the Statute, but when the assent is after the recouerie, then mee thinketh it is not so, ne that the right of the first taylor, which was receiued by the sayde Statute shall not bee extinct by his fine, no more then it shall in other

The 31. Chapter.

other taile. S. I will be aduised vpon thy opinion in this matter, but yet one thing would I moue farther vpon this statute, and that is this: Some say, that by this statute all other recoveries that haue bin had ouer beside these recoveries of Jointoyrs bee affirmed, for they say, that At the Parliament at the making of this Statute knewe well that many other recoveries were then vsed and had, to defeat Tailles, that that it was like that they would so continue, which neuerthelesse the Parliament did not prohibite for the time to come, as it did the said recoveries of Jointoyrs: that it is therefore to suppose, that they thought that they should stand with Law and conscience: but because Jointoyrs were made rather for the sauing of the inheritance of the husband then to destroy the inheritance, they say that the Parliament thought and iudged the alienations and recoveries of such Jointoyrs to be against the law and conscience, and not the Alienations of other landes entailed, for if they had, they say that the Parliament would haue auoided recoveries of tailed landes generally aswell as it did of Recoveries of Jointoyrs. Do. As to that opinion I will answere thee thus for this time, that though that the makers of the said estatute onely put away recoveries of Jointoyrs, and not other recoveries, that yet it cannot be taken therefore that their intent was that the other Recoveries should stand good and perfect, for they spake the onely of Jointoyrs, because there was no complaint made in the Parliament at that time, but
against

against recoveries had of Jointors, & therefore it seemeth that they intended nothing concerning other recoveries, but that they should be of the same effect as they were before, and no otherwise. And that will appeare moze plaine: ly thus: though the makers of the said statute intended to put away & adnuyl such recoveries as should be made of ioyntors after a certaine day limited in the statute, that yet they intended not to auoide ne affirme such recoveries of Jointors as were passed before that time: and if they intended not to auoide ne affirme the recoveries had of Jointors before that time, the how can it be taken that they intended to put away, or affirme other Recoveries that were passed before that time, & not of Jointors that would not affirm, ne put away recoveries passed of Jointors before that time? And so as it seemeth, they intended to spare the multitude of them that were passed of both, and not to comfozt any to take them after that time. S. I am content thy opinion stand for this time, and I will aske thee another question.

¶ The sixth question of the Student concerning tailed landes.

Cap. 32.

If tenant in talle be disseised, & die, & an avunceller collateral to the heire in talle release is a warranty, and dye, & the warranty discendeth upon the heire in the talle, whether is hee there

The 32. Chapter.

therby barred in conscience, as he is in the law.
D. Because your principall intent at this time
 is to speake of recoveries & not of warranties,
 & also because it hath bin of long time taken for
 a principall Maxime of the law, that it should be
 a barre to the heyres aswell that claime by a fee
 simple, as by state taile, and for that also that it
 was not put away by the said statute of W. 2.
 which ordeined the taile, I will not at this
 time make thee an aunswere therein, but will
 take a respitte to bee advised. **Stu.** Then I pray
 thee yet or we depart shewe mee what was the
 most principall cause that moued thee to moue
 this questio of recoveries had of tailed lands.
D. This moued me thereto. I haue perceiued
 many times that there bee many diuers opini-
 ons of these Recoveries, whether they stand
 with conscience or not, & that it is to doubt that
 many persons run into offence of Conscience
 thereby. And therefore I thought to feele the
 mind in them, whether I could perceiue that it
 were cleere, that they serued to breake the taile
 in law and conscience, or that it were clerely a-
 gainst conscience so to breake the taile, or that it
 were a matter in doubt, & if it appeared a mat-
 ter in doubt, or that it appeared that the mat-
 ter were vsed clerely against conscience, then I
 thought to doe somewhat to make the matter
 appeare as it is, to the intent that they that
 haue the rule and charge ouer the people aswell
 the spirituall men as tempozal men, should the
 rather endeauour them to see it reformed for the
 common wealth of the people, aswell in bodie
 as in soule. For when any thing is vsed to the
 dis-

displeasure of God, it hurteth not only the body, but also the soule. And tēpoꝝ all rulers haue not onely cure of the bodyes, but also of the soules, & that answere for them if they perish in their default: and because it seemeth by & moze apparant reason that the tassel be not broken, ne fully auoyded by the sayd recoueries, & that yet neuerthelesse the great multitude of them that bee passed is right much to bee pondered. Therfoze it were very good to prohibite them for time to come, to put away such ambiguities and doubts as rise now by occasion of the said recoueries, and so they be put as snares to deceiue the people, and so will they be as long as they be suffered to cōtinue. And me thinketh verely that it were therfoze right expedient that Tayled landes should from hencefoꝝth either be made so strong in the law, that the tassel should not bee broken by recouerie, sine with proclamation, collateral warrant, noꝝ otherwise: oꝝ else that all tayles should be made fee simple, so that euery man that list to sell his land, may sell it by his bare feoffment, & without any scruple oꝝ grudge of conscience, & then there should not be so great expences in law, noꝝ so great variance among the people, ne yet so great offence of conscience as there is now in many persons. S. Merle me thinketh that thy opinion is right, good, & charitable in this behalfe. And that the rulers bee bound in conscience to looke vpon it, to see it reformed and brought into good order. And verely by that thou hast said therein thou hast brought me into remembrance that there bee diuers like snares cons

The 32. Chapter.

concerning spirituall matters suffred among þ
people, whereþ I doubt that many spirituall
rulers be in great offence against god. As it is
of the point that spirituall men haue spoken so
much of, that priests should not be put to ans-
were before lay men, specially of felonies and
murders, & of the statute of 45.E.3.C.3. where
it is sayd that a prohibition shall lye where a
man is sued in the spiritual Court for tithe of
wood, þ is aboue þ age of xx. yere, by þ name of
Silua Cedua as it hath done before, & they haue
in open Sermons, & in diuers other open com-
munications & counsels caused it to be openlie
notified & knowen, that they should be al accus-
sed that put Priests to answer, or that main-
tain þ said estatute, or any other like to it. And
after when they haue right wel perceiued that,
notwithstanding al that they haue don thertn,
it hath bin vsed in the same points through all
the realme in like maner as it was before: The
they haue let stil & let þ matter passe, & so when
they haue brought many persons in great dan-
ger, but most specially them that haue giuen
credence to their saying, & yet by reason of þ old
custome haue done as they did before, the there
they left them, but verily it is to feare that
there is to themselves right great offence ther-
by, that is for to say, to see so many in so great
danger as they say they be. And to doe no more
to bring them out of it, then they haue done for
it, if it bee true as they say, they ought to sticke
to it with effect in all charity, till it were refoz-
med. And if it be not as they say, then they haue
caused many to offend that haue giue credence
to

to them, and per contrary to their owne conscience do as they did before, & that percase should not haue offended if such sayinges had not bin. And so it seemeth that they haue in these matters done either too much, or too little.

And I beseech almighty God & some good man may so call vpon al these matters that we haue now commoned of, so that they that be in authoritey may somewhat ponder them, and to order them in such maner that offence of conscience growe not so lightly thereby hereafter as it hath done in times past. And verely hee that on the Crosse knewe the price of mans soule, will hereafter aske a right straight account of rulers for euery soule that is vnder them, and that shall perish through their default.

Thus haue I shewed vnto thee in this little Dialogue howe the Lawe of England is grounded vpon the Lawe of reason, the law of God, the generall Customes of the Realme, & vpon certaine principles that be called Maximes, vpon the particuler Customes vsed in diuers Cities and countries, and vpon Statutes which haue been made in diuers Parliaments by our Soueraigne Lorde the King and his progenitors, and by the Lords Spiritual and Temporall, and all the Commons of the Realme. And I haue also shewed thee in the 9. Chapter of this Booke, vnder what maner the sayd generall Customes and Maximes of the law may bee proued & affirmed if they were denied, & diuers other thinges be contained in this present Dialogue, which will appeare in

The 32. Chapter.

the table that is in the latter ende of the booke,
as to the Readers wil appeare. And in the end
of the said dialogue, I haue at thy desire shew-
ed thee my conceipt concerning Recoueries of
tayed lands, and thou hast vpon the said reco-
ueries shewed me thine opinio. And I beseech
our Lord set the shortly in a good cleere way,
for surely it will be right expedient for the well
ordering of conscience in many persons,
that they be so. And thus the God
of peace and loue bee
alway with vs.
Amen.



The Prologue.

58



Here endeth the first Dialogue in English, with new additions betwixt a Doctor of diuinity, and a Student in the Lawes of England. And hereafter followeth the second.

In the beginning of which Dialogue the Doctor answereth to certaine questions, which the Student made to the Doctor before the making of his Dialogue, concerning the lawes of England & conscience, as appeareth in a Dialogue made betweene them in Latine the 24. Chapt. And he answereth also to diuers other questions that the Student maketh to him in this dialogue, of the law of England and conscience. And in diuers other Chapters of this present Dialogue is touched shortly, how the lawes of England are to bee obserued and kept in this Realme, as to temporall things, as well in law as in conscience, before any other lawes. And in some of the Chapters thereof, is also touched that spirituall Iudges in diuers cases bee bound to giue their Iudgments according to the kings law. And in the latter end of the book the doctor moueth diuers cases concerning the lawes of England, wherein he doubteth how they may stand with conscience, wherunto the Student maketh answer in such manner as to the Reader will appeare.

H. J.

3n

The Introduction.

In the latter ende of our first Dialogue in Latine, I put diuers cases grounded vpon the Lawes of England wherein I doubted, and yet doe, what is to bee holden therein in conscience. But forasmuch as the time was then farre past, I shewed thee that I would not desire thee to make answer to the foolishly with at that time, but at some better leisure, to whereunto thou sayst thou wouldest not onely shew thine opinion in these cases, but also in such other cases as I would put: wherefore I pray thee now (forasmuch as me thinketh thou hast good leisure) that thou wilt shew me thine opinion therein. Do. I will with good will accomplish thy desire: but I would that when I am in doubt what \S law of this realme is in such cases as thou shalt put, that thou wilt shew me what \S law is therein: for though I have by occasi^on of our first Dialogue in latine learned many things of the lawes of this realme which I knew not before, yet neuertheless there bee many mo^re things that I am yet ignorant in, and that peradventure in these selfe cases that thou hast put & intende hereafter to put: & as I said in the first Dialogue in Latin the 20. Cha. to search conscience vpon any case of the law it is in vaine, but where the law in the same case is perfectly knowen. Su. I will with good will do as thou saiest, & I intend to put diuers of the same questions, that be in the last Cha. of the said Dialogue in latin, & sometime I intend to alter some of them, and adde some new questions to them, as I shalbe most
in

in doubt of. D. I pray thee do as thou saist, and I shall with good wil either make answer to them forthwith as well as I can, or shall make longer respite to bee aduised, or else peraduenture agree to thine opinion therein, as I shall see cause. But first I would gladly know the cause why thou hast begun this Dialogue in the English tongue, & not in the latine tongue, as the first cases þ thou desirest to know mine opinion, be in, or in French as the substance of the law is. S. The cause is this. It is right necessary to all men in this realme, both spirituall and tempozal for the good ordering of their conscience, to know many thinges of the Lawe of England þ they bee ignozant in. And though it had bin moze pleasant to the that be learned in the latin tongue to haue had in latine rather then in English: yet neuertheles forasmuch as many can read English that vnderstand no latine, and some that cannot read English, by hearing it read may learne diuers thinges by it, that they should not haue learned if it were in latin: Therfoze for the profit of the multitude it is put into the English tongue rather then into the latin or french tongue. For if it had bin in french, fewe should haue vnderstood it, but they that be learned in the laws, and they haue least neede of it, forasmuch as they knowe the law in the same cases without it, and can better declare what conscience will thereupon, then they that know not the law nothing at al. To them therfoze that bee not learned in the law of the realme this treatise is specially made, for thou knowest well by such studies thou haste
 by us. taken

The 1. Chapter.

taken to some knowledge of the Lawe of the realme, that is to them most expedient? D. It is true that thou sayest and therefore I pray thee now proceede to the questions.

¶ The first question of the Student.

Cap. 1.

If tenant in taile after possibility of issue extinct, do wast, whether doth he thereby offend in conscience though he be not punishable of wast by the law? D. Is the law cleare that he is not punishable for the wast? S. Ye verely. D. And what is the law of tenants for terme of life, or for terme of yeeres if they doe waste? S. They bee punishable of waste by the Statutes, and shal yeeld treble damages, but at the common lawe before the Statute they were not punishable. D. But whether thinkest thou that before the Statute they might haue done wast with conscience, because they were not punishable by the Lawe. Sr. I thinke not for as I take it, the doing of wast of such particuler tenant for terme of life, for terme of yeeres, or of tenants in Dower, or by the curtesie, is prohibited by the lawe of reason, for it seemeth of reason that when such leases be made, or that such titles in Dower or by the curtesie bee given by the Lawe, that there is only giuen vnto them the annuall profits of the land, and not the houses and trees, and the grauell to digge and carry away, whereby the whole profit of them in the reuerſion should bee taken away
for

for ever. And therefore at the common law for
wast done by tenant in dower or tenant by the
curtelle, there was punishment ordained by the
Lawe by a prohibition of wast, whereby they
should haue recouered damages to the value of
the wast. But against tenants for terme of life
or for terme of yeares lay no such prohibition
for there was no Maxime in the lawe therein,
against them, as there was against the other.
And I thinke the cause was forasmuch as it
was iudged a folly in the lessor that made such
a lease for terme of life, or for terme of yeares,
that at the time of the lease he did not prohibite
them they should not doe wast, and sith he did
not prouide no remedie for himselfe, the Lawe
would none prouide. But yet I thinke not that
the intent of the law was that they might law-
fully and with good conscience doe wast, but a-
gainst tenants in dower, and by the curtelle the
law prouided remedie, for they had their title by
the law.

And verily me thinketh that this tenant in
taile as to doing of wast, should be like to a te-
nant for terme of life, for he shall haue the land
no longer then for terme of his life, no more the
a tenant for terme of life shall, and the wast of
this ternaunt is as great hurt to him in the res-
uerſion or the remainder, as is the wast of a te-
naunt for terme of life, and if hee alien, the
donor shall enter for the forfeiture, as hee shall
upon the alienation of a tenant for terme of life,
and if he make default in a præcipe quod red-
dat, the donour shall be receiued as he shall bee
upon the default of a ternaunt for terme of life,

¶ iiii.

and

The 1. Chapter.

and therefore me thinketh hee shall also be punishable of wast, as tenant for terme of life shal. S. If he alien, the donoz shal enter as thou saist because the alienation is to his disheritance, & therfore it is a forfeiture of his estate: and that is by an aunient Maxime of the lawe that giueth that forfeiture in the selfe case, and if hee make default in a *Præcipe quod reddat*, he in þe reuerend, as thou saist shalbe receiued, but that is by the statute of West. 2. for at the common law there was no such rescitt, & as for the statute that giueth the action of Waste against a tenant for terme of life, and for terme of yeeres, it is a statute penal and shal not be taken by equity, and so there is no remedie giuen against him, neither by common law nor by statute, as there is against tenant for terme of life, & therfore he is unpunishable of wast by the law. D. And though he be unpunishable of wast by the law, yet neuerthelesse me thinketh hee may not by conscience doe that, that shal be hurtfull to the inheritance after his tyme, sith he hath the land but for terme of his life, no moze then a tenant for terme of life may, for then he should do as he would not bee done vnto. For thou as greest thy selfe that though a ternaunt for terme of life was not punishable of Waste before the Statute, that yet the Law iudged not that hee might rightfully and with good conscience doe wast. And therefore at this day if a feoffment bee made to the vse of a man for terme of life, though there lie no actiō against him for wast, yet he offendeth in conscience if he doe wast, as ternaunt for terme of life did afore the Statute

tute, when no remedie lay against him by the law. S. That is true, but there is great diversity between this tenant and a tenant for terme of life: for this tenant hath good authoritie by the donour to doe wast, and so hath not the tenant for terme of life, as it is sayd before: for the estate of a ternaunt in taile after possibilitie of issue extinct, is in this maner, when lands be given to a man and to his wife, & to the heires of their two bodies begotten, and after the one of them dyeth without heires of their bodies begotten, then he or shee that overliueth is called ternaunt in taile after possibilitie of issue extinct, because there can neuer bee no possibilitie by any heire that may inherite by force of the gift. And thus it appeareth that the donees at the time of the gift, receiued of the donour estate of inheritance, which by possibilitie might haue continued for euer, whereby they had power to cut downe Trees, and to doe all thing that is wast, as tenant in fee simple might. And that authoritie was strong in the Lawe, as if the lessour that maketh a lease for terme of life, say by expresse wordes in the lease, that the lessee shall not be punishable of wast: And therefore if the donour in this case had graunted to the donees that they should not bee punishable of wast, that grant had been void, because it was excluded in the gift before, as it should be vpon a gift in fee simple: and so forasmuch as by the first gift and by the liuery of seisin made vpon the same, the donees had authoritie by the donour to doe wast: Therefore though that one of those donees be now dead without issue, so that

The 1. Chapter.

that it is certeine that after the death of the o-
ther, the land shall reuert to the donoz: yet the
authorite that they had by the donour to doe
wast, continueth as long as the gift, and the
liuery of seisin made vpon the same continueth:
And I take this to bee the reason why he shal
not haue in aide as tenant for terme of life shal,
that is to say, for that he cannot aske helpe of
that Maxim, whereby it is ordeined that a
tenant for terme of life shal haue in aide, for he
cannot say, but that he took a greater estate by
the liuery of seisin that was made to him, which
yet continueth, then for terme of life, and so I
thinke him not bound to make any restitution
to him in the reuerſion in this case, for the
wast. D. Is thy minde only to proue that this
tenant is not bound to make restitution to him
in the reuerſion for the wast: that thou think-
est that hee may with cleare conscience doe all
maner of wast: S. I intend to proue no moze,
but that he is not bound to restitution to him
in the reuerſion D. Then I will right well a-
gree to thine opinion for the reason that thou
hast made, but if thy mind had bin to haue pro-
ued that hee might with cleare conscience haue
done al maner of wast, I would haue thought
the contrary therto, & that the tenant in fee ſim-
ple may not do al maner of wast and destructi-
on with conscience, as to pull downe houses &
make pastures of Cities and townes, or to do
such other actes which be against the common
wealth. And therfore some will say that tenant
in fee ſimple may not with conscience destroy
his woods & coale pits wherby a whole coun-
tre

trep for their money haue had fuel, & yet though he do so, he is not bound by conscience to make restitution to no person in certain. But now I pray thee ere thou proceede to the second case, that thou wilt somewhat shew me what thou meanest when thou saiest, at the common Law it was thus or thus: I vnderstand not fully what thou meanest by that terme, at the common Law. S. I shall with good wil shew thee what I meane thereby.

¶ What is meant by this terme when it is said, thus it was at the Common Law.

Cap. 2.

The common law is taken three manner of waies. first it is taken as the law of this realm of England disseuered from all other Lawes. And vnder this manner taken: It is often times argued in the Lawes of England what matters ought of right to be determined by the common Lawe, and what by the Admirals Court, or by the Spirituall court: And also if an Obligation beare date out of the realme, as in Spaine, Fraunce, or such other, It is said in the Lawe and truth it is, that they be not pleadable at the common law. Secondly the common law is taken as the kings courts of his Bench, or of the Common Place, and it is so taken when a plee is remoued out of ancient demesne for that the land is franke fee & pleadable at the common Law, that is to say, in the kings court, and not in Ancient demesne.

And

The 3. Chapter.

And vnder this maner taken, it is oftentimes pleaded also in base Courts, as in courts Barons, the county, and the court of Hipouders, and such other, this matter or that &c. ought not to bee determined in that Court, but at the Common Lawe, that is to say, in the kinges Courtes &c. Thirdly by the Common law is vnderstood such things as were law before any Statute made in þe point that is in question, so that that point was holden for Law by the general or particuler customes and Maximes of the Realme, or by the law of reason and the law of god, no other law added to them by Statute, nor otherwise, as is the case before rehearsed in the first chapter, where it is said, that at the Common Law tenant by the Curtesie and tenant in Dower were punishable of wast, that is to say, that before any Statute of wast made, they were punishable of wast by the ground & Maximes of the Lawe vsed before the Statute made in that point. But tennaunt for terme of life, ne for terme of yeres, were not punishable by the said grounds and Maximes, till by the Statute remedy was giuen against them, and therefore it is sayd, that at the Common Law they were not punishable of wast. Do. I pray thee now proceede vnto the second question.

¶ The second question of the Student.

Cap. 3.

If a man be outlawed & neuer had knowledge of the suit, whether may the king take all his goods,

goods, & retaine them in conscience as hee may
 by the law. D. What is the reason why they be
 forfeited by the law in that case. Stu. The ve-
 ry reason for that it is an old Custome and an
 old Maxime in the Law, that he that is Out-
 lawed shall forfeit his goods to the King, and
 the cause why that Maxime began, was this :
 when a man had done a trespassse to an other, or
 an other offence wherefore processe of vtilagery
 lay, and hee that the offence was done to, had
 taken an action against him according to the
 lawe, if hee had absented himselfe and had no
 landes, there had been no remedy against him:
 for after the Law of England, no man shal be
 condemned without aunswere, or that hee ap-
 peare and will not aunswere, except it be by
 reason of any Statute. Therfore for the pu-
 nishment of such offenders as will not appeare
 to make aunswere and to bee iustified in the
 Kings Court, it hath beene vsed without time
 of mind, that an attachment in that case should
 bee directed against him retournable in the
 Kings Bench or the Common place, and if
 it were returned therupon that he had nought
 whereby hee might bee attached, that then
 should goe forth a Capias to take his person,
 and after an Alias Capias, & then a Pluries, and
 if it were returned vpon euery of the sayd Ca-
 pias that hee could not bee found and hee ap-
 peared not, then should an Exigent be directed
 against him, which should haue so long a day
 of returne, that sūe Countie might bee hold-
 den before the returne thereof, and in euerie
 of the said sūe Countie, the defendant to bee
 so

The 3. Chapter.

solemnely called, and if he appeareth not, then for his contumacy and disobedience of the law, the Cozoners to giue Judgement that he shal bee Outlawed, whereby hee shall forfeit his goods to the king and lesse diuers other aduantages in the Lawe that needeth not here to bee remembred now. And so because hee was in this case called according to the lawe and appeared not, it seemeth that the king hath good title to the goods both in law and conscience.

D. If he had knowledge of the suit in very deed, it seemeth the king hath good title in conscience as thou saiest. But if he had no knowledge thereof: it seemeth not so, for the default that is adiudged in him (as appeareth by thine owne reason) in his contumacie and disobedience of the law, and if he were ignorant of the suit, then can there bee assigned to him no disobedience: for a disobedience implieth a knowledge of that he should haue obeyed vnto.

Sir. It seemeth in this case that hee should be compelled to take knowledge of the suite at his perill, for sith he hath attempted to offend the Law: it seemeth reason that he shalbe compelled to take heede what the law will doe against him for it, and not onely that, but that he should rather offer amendes for his Trespasse then for to tarrie till he were sued for it.

And so it seemeth the ignorance of the suite is of his owne default, specially sith in the law is set such order that every man may knowe if he will, what suite is taken against him, and may see the Records thereof when hee will, and so it seemeth that neither the partie nor the

the law be not bounden to giue him no know-
ledge therein. And ouer this I would some-
what moue further in this matter thus. That
though that action were vnttrue and the defend-
dant not guilty, that yet the goods bee forfeit-
ted to the king for his not apparance in Law,
and also in conscience, and that for this cause
the king as Soueraigne and head of the law,
is bounden of Justice to graunt such writts
and such processe as bee appointed in the law
to euery person that wil complaine, be his sur-
mise true or false, and thereupon the king (of
Justice) oweth as well to make Processe to
bring the defendant to answer when he is
not guiltie, as when hee is guilty, and then
when there is a Maxime in the lawe, that if a
man be Outlawed in such maner as before ap-
peareth, that he shall forfeite all his goods to
the king, and make no acception whether the
action be true or vnttrue: It seemeth that the
said Maxime more regardeth the generall mi-
nistracion of Justice, then the particuler right
of the party, and therefore the propriety by the
Outlaw and by the said Maxime ordained for
ministracion of Justice, is alfred and is giuen
to the king, as before appeareth, and that both
in Law and in conscience, aswel as if the actiō
were true. And then the party that is so Out-
lawed is giuen to sue for his remedy against
him that hath so caused him to bee Outlawed
vpon an vnttrue action.

D. If he haue not sufficient to make recom-
pence, or dye before recoverie can be had, what
remedy is had then? Scil. I thinke no remedy,
and

The 3. Chapter.

and for a further declaratiō in this case and in
such other like cases where the property of
goods may be altered without consent of h^e ow-
ner, it is to consider that the property of goods
be not giuen to the owners directly by the law
of reason nor by the law of God, but by h^e lawe
of man, and is suff^{er}ed by the lawe of reason &
by the Law of God so to be. For at the begin-
ning all goods were in common, but after they
were brought by the law of man into a certain
property, so that euerie man might knowe his
owne, and then when such property is giuen by
the law of man, the same law may assigne such
conditions vpon the propertye as it listeth, so
they be not against the law of God, ne the law
of reason, and may lawfully take away that it
giueth, and appoint how long the propertye
shall continue. And one conditiō that goeth
with euery propertye in this Realme is, if hee
that hath the propertye bee outlawed according
to such processe as is ordeined by the law, that
he shall forfeit the property vnto the king. And
diuers other cases there bee also, whereby pro-
perty in goods shall be altered in the law, and
the right in landes also without assent of the
owner, whereof I shall shortly touch some
without saying any authoritie therein, for the
more shortnes. First by a sale in open market
the property is altered. Also goods stolen and
seised for the king, or forfeit, be forfeit, vnles
appeale or inditement bee sued. Also Strates, if
they bee proclaymed, and be not after claimed
by the owner within the yeere, be forfeit, & also
a Decodand is forfeit to whome soeuer the pro-
pertye

perty was before (except it belonged to the King) & shal be disposed for the soule of him that was slaine therewith, & a fine with a Proclame at the Common law, was a barre, if claime were not made within a yere, as it is now by statute if the claime be not made within 5. yere. And all these forfeitures were ordained by the Law upon certaine considerations which I omit at this time, but certaine it is that none of them were made upon a better consideration then this forfeiture of Attlagary was. For if no especial punishment should haue bin ordained for offenders that would absent themselves & not appeare when they were sued in the Kings courts, many suites in the Kings courts should haue bin of small effect. And with this Maxime was ordained for the execution of Justice, & as much done therein by the common law, as possible of man could reasonably deuise, to make the party haue knowledge of the suit, and now is added thereto by the statute made the 6. yere of H. 8. that a writ of Proclamation shall bee sued if the party be dwelling in an other shire: it seemeth that such Title as is giuen to the King thereby is good in conscience, especiallie seeing that the King is bound to make proces upon the surmise of the plaintiffe, and may not examine but by plee of the partie, whether the surmise bee true or not. But if the partie bee returned five times called, where indeede hee was neuer called (as in the second case of the last Chapter of the said Dialogue in latin is contained) then it seemeth the partie shall haue good remedy by petition to the King, spe-

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cially

The 4. Chapter.

cially if he that made the returne be not sufficient to make recompence, or tpe before recovery can be had. Do. Now lth I haue heard thine opinion in this case, whereby it appeareth that many things must be scene, or a ful and a plain declaration can bee made in this behalfe, & seeing also that the platne aunswere to this case, shall giue a great light to diuers other cases that may come by such forfature: I pray thee giue me a farther respite, ere that I shew thee my full opinion therein, and hereafter I shal right gladly doe it. And therfore I pray thee proceed now to some other case.

¶ The third question of the Student.

Cap. 4.

If a stranger do Waste in landes þ an other holdeth for terme of life without assent of the tenant for term of life, whether may he in the reuerſion recover treble damages, and the place wasted against the ternaunt for terme of life according to the statute, in conscience, as he may by the law, if the stranger be not sufficient to make recompence for the wast done. D. Is the lawe cleere in this case that he in the reuerſion shall recover against the ternaunt for terme of lyfe though that he assented not to the doing of Waste. S. Ye hereby, and yet if the ternaunt for terme of life had been bounden in an Obligation in a certain summe of mony that he should do no Waste, he should not forfeit his bond by Waste of a stranger, and the diversity is this.

¶

It hath beene vsed as an ancient Maxime in the law that tenant by the Curtesle & tenant in Dower should take the land with this charge, that is to say, that they should do no wast thes selues, nor suffer none to be done, and when an action of wast was giuen after against a tenat for terme of life, then was he taken to be in the same case as to the point of wast, as tenant by the Curtesle, & ternaunt in Dower was, that is to say, that he should doe no Wast, nor suffer none to be done, for there is an other Maxime in the law of England, that all cases like vnto other cases shalbe iudged after the same law as other cases be, & such no reason of diuersity can be assigned why the tenant for terme of life after an action of Wast was giuen against him, should haue any more fauor in the law then the ternaunt by the Curtesle, or ternaunt in Dower should: therfore he is put vnder the same Maxime as they be, that is to say, that he shall do no wast, ne suffer none to bee done, & so it seemeth that the law in this case doth not consider the abilitie of the person that doth the Wast, whether he be able to make recōpence for the wast or not, but the assent of the said tenants where by they haue wilfully taken vpon thes charge to see that no wast shalbe don. D. I haue heard that if houses of these ternaunts bee destroyed with sodaine tempest, or with strange enemies & they shal not be charged with wast. S. Truth it is. Do. And I thinke the reason is because they can haue no recovery ouer. St. I take not that for the reason, but that it is an olde reasonable Maxime in the Lawe that they should

I d.

be

be discharged in these cases, howbeit some will say that in these cases the Law of Reason doth discharge them, & therefore they say that if a Statute were made, that they should be charged in these cases of wast, that y^e Statute were against reason, & not to be obserued, but yet neuertheless I take it not so, for they might refuse to take such estate if they would, & if they will take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condution that is appointed thereto by the Law, though hurt might follow to them afterward thereby: for it is often times seene in the Law that the Law doth suffer him to haue hurt without help of the Law, that wil wilfully run into it of his own act not compelled thereto, & adudgeth it his follie so to run into it, for which follie he shal also be many times without remedy in conscience. As if a mā take lands for term of life, and bindeth himselfe by obligation that he shal leaue y^e land in as good case as he found it, if the houses bee after blowen downe with tempest or destroyed with straunge enemies, as in the case that thou hast put before, he shall be bound to repaire them or els he shal forsaite his Obligation in Law & conscience, because it is his owne act to bind him to it, and yet the Law would not haue bound him thereto, as thou hast said before. Some thinketh that the cause why the said tenants be discharged in the law in an action of wast when the houses be destroyed by sodaine tempest, or by strange enemies, is by a special reasonable Maxime in the law whereby they be excepted from the other generall bond, before

before rehearsed, that is to say, they shall at their
 perill see that no wast shall be done, & not by the
 law of reason, & although there is no maxime in this
 case to helpe this tenant, ne that he cannot be
 holpen by the law of reason, it seemeth that he
 shall be charged in this case by his own act both
 in law & conscience, whether the stranger be a-
 ble to recompence him or not. D. I doubt in this
 case whether the Maxime that thou speakest of
 be reasonable or not, that is to say, that tenants
 by the curtesie & tenants in dower were bound
 by the common law, that they should do no wast
 themselves, and ouer that at their perill to see
 that no wast should be done by none other. For
 that law seemeth not reasonable that bindeth a
 man to an impossibility. And it is impossible to
 preuent that no wast shall be done by strangers,
 for it may be sodainly done in the night, that the
 tenants can haue no notice of, or by great
 power that they be not able to resist and there-
 fore me thinketh they ought not to be charged
 in those cases for the wast, without they may
 haue good remedie ouer, and then percase the
 said maxime were sufferable, & as me thinketh
 it is a Maxime against reason. S. As I haue
 said before no man shall be compelled to take the
 bond upon him, but he that wil take the land, &
 if he will take the land, it is reason he take the
 charge as the law hath appointed it, and then
 if any hurt grow to him thereby, it is through
 his owne act and his owne assent, for he might
 haue refused the lease if he would. D. Though
 a man may refuse to take estate for term of life,
 or for terme of years, and a woman may refuse

I 19.

to

The 4. Chapter.

to take her dower, yet tenaunt by the Curtesie cannot refuse to take his estate, for immediately after the death of his Wife, the possession abideth still in him by the act of the law without entry, & then I put the case that after the death of his wife, he would waite the possession, and after waite were done by a stranger, whether thinkest thou that hee should answer to the Waste? S. I think he should by the law. D. And how standeth that with reason, seeing there is no default in him. S. It was his default, and at his owne perill that hee would marry an inheritor whereupon such danger might follow. D. I put case that hee were within age at the marriage, or that the land descended to his wife after he married her. S. There thou mouest a farther doubt then the first question is, and though it were as thou sayest, yet thou canst not say but that there is a great default in him as is in him in the reuerſion, & that there is as great reason why hee should be charged with the Waste, as that he in the reuerſion should be disinherited and haue no maner remedy, ne yet no profit of the land as the other hath, and though the said maxime may be thought very straight to the said tenants, yet it is for to be fauoured as much as may be reasonably, because it helpeth much the common wealth: for it hurteth the common welth greatly when woods and houses be destroyed, and if they should answer for no waste, but for waste done by themselves, there might be wastes done by strangers by commandement, or assent in such colourable maner, that they in the reuerſion should neuer haue proofe of

of their assent. Do. I am content thine opinion stand for this time, and I pray thee now proceed to an other question.

¶ The 4. question of the Student.

Cap. 5.

If he that is the very heire be certified by the ordinary bastard, & after bring an action as heire against an other person, whether may any man knowing the truth be of counsel with the tenant and plead the said certificat against the demandant by conscience or not. D. As the lawe in this case that all other agaynst whom the demandant hath title shall take advantage of this certificat, as well as hee at whose suit hee is certified bastard. S. Ye verily, & that for two causes, whereof the one is this. There is an old Maxime in the law, that a mischief shalbe rather suffered than an inconvenience, & then in this case if an other Writ should afterward be sent to an other Bishop in an other action, to certifie whether he were bastard or not, peradventure the Bishop would certifie h̄ hee were mulier, that is to say, lawfully begotten, & then he should recover as heir, & so he should in one selfe court be taken as mulier and bastard: for avoiding of which contrariety, the law will suffer no moe Writs to go forth in that case, & suffereth also all men to take advantage of the certificate, rather then to suffer such a contradiction in the court, which in h̄ law is called an inconvenience, & the other cause is because this

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The 5. Chapter.

certificat of the Bishop, is the highest trial that is in the Lawe in this behalfe, but this is not vnderstood but where bastardy is layed in one that is party to the writ, for if bastardy be laid in one that is a stranger to the writ, as if you chee pray in aid or such other, then that bastardy shal be tried by xi. men, by which triall he in whom the bastardy is laid, shal not be concluded, because he is not party to the triall, & may haue no attaint, but he that is party to the issue may haue attaint, and therefore he shal be concluded & none other but he: & forasmuch as the said marriage was ordeined to eschur an inconuenience (as befoze appeareth) it seemeth that euery man learned, may with conscience plead the said certificate for auoiding thereof, & giue counsaile therein to y^e party according vnto the law, for els the said inconueniency must needs follow. But yet neuerthelesse I doe not meane thereby that the party may after when he hath barred the demaundant by the said certificate, retaine the land in conscience by reason of the said certificate, for though there be no Law to compell him to restore it, yet I think well that hee in conscience is bound to restore it, if hee knew y^e the demaundant is the very true heire, whereof I haue put diuers cases like in the xvij. Chapter of our first Dialogue in Latine, but my intent is that a man learned in the law in this case and other like, may with conscience giue his counsel according to the law, in auoiding of such things as the law thinketh should for a reasonable cause be eschewed. D. Though hee that doth not know whether he be bastard

or not, may giue his counsaile, & also plead the
 sayd certificate: yet I thinke that hee that doth
 know himselfe to bee the very true heire may
 not plead it, and that is for two causes, wherof
 the one is this: Every man is bound by the lawe
 of reason to doe as he would be done to, but I
 thinke that if hee that pleadeth that certificate
 were in like case, he would thinke that no man
 knowing the certificate to bee untrue, might
 with conscience pleade it against him, where-
 fore no more may hee plead it against none o-
 ther: The other cause is this, although the
 certificate be pleaded, yet is the tenant bounde
 in conscience to make restitution thereof, as
 thou hast sayd thy selfe, and then in case that he
 would not make restitution, then he that plea-
 deth the plee, should run thereby in like offence,
 for he hath holpen to set the other man in such
 a libertie that hee may choose whether hee will
 restore the land or not, and so hee should put
 himselfe to teopardy of an other mans conscie-
 nce. And it is writtten Ecclesiast. 3. Qui amat
 periculum peribit in illo, that is, hee that wil-
 lulle will put himselfe in teopardie to offend,
 shall perish therein, And therefore it is the sur-
 rest way to eschew perils, for him that know-
 eth that he is heire, not to plead it, And as for
 the inconuenience that thou sayest must needes
 follow, but the certificate bee pleaded: As
 to that it may be answered, that it may bee
 pleaded by some other that knoweth not that
 he is very heire, & if the case be so far put that
 there in none other learned there but hee, then
 me thinketh that hee shall rather suffer the said
 incon-

The 6. Chapter.

Inconuenience, the to hurt his owne conscience. for alway charity beginneth at himselfe, and so every man ought to suffer all other offences rather then he himself would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to an other question.

¶ The 5. question of the Student.

Cap. 6.

Whether may a man with conscience bee of counsell with the plaintife in an action at the common lawe, knowing that the defendante hath sufficient matter in conscience whereby he may be discharged by a sub pena in *h* Chancery, which he cannot plead at the common lawe or not. Doct. I pray thee put a case thereof in certeine, for else *h* question is very general. S. I will put the same case that thou puttest in our first dialogue in Latin, the 1. Chapter, that is to say: If a man bound in an Obligation pay the money, and taketh no acquittance, so that by the common lawe he shalbe compelled to pay the money again for such consideration, as appeareth in the 15. Chap. of the said Dialogue, where it is shewed evidently how the Lawe in *h* case is made by a good reasonable ground, much necessary for al the people, howbeit, that a man may sometime through his owne default, take hurt thereby, wherein I pray thee shew mee thine opinion. D. This case seemeth to be like to the case that thou hast next before this, & that he that knoweth the payment to be made doeth not as he would be done to, if he give counsell that an action should bee taken to haue it payed againe.

gaine. S. If he bee sworne to giue counsaile according to the Law, as Sericants at the law be, it seemeth he is bound to giue counsaile according to the Lawe, for els he should not perforce his oath D. In these words (according to the law) is vnderstood the law of God, and the law of reason, as wel as the law & customes of the Realme, for as thou hast said thy selfe in our first dialogue in latyn, that the law of god, & the law of reason, bee two especiall groundes of the lawes of England, wherefore as me thinketh he may giue no counsell (sauiug his oath) neither against the law of God, nor the law of reason. And certeine it is that this article, that is to say, that a mā shal do as he would be done to, is grounded vpon both the sayd lawes. And first that it is grounded vpon the Law of reason, it is euident of it selfe. And in the 6. Chapter of Saint Luke it is said, Et prout vultis vt faciant vobis homines, & vos facite illis similiter, that is to say. All that other men should do to you, do you to them, & so it is grounded vpon the Law of God, wherefore if hee should giue counsell against the defendant in that case, hee should do against both the said lawes. S. If the defendāt had no other remedy but the common law, I would agree wel it were as thou saiest, but in this case he may haue good remedy by a Sub pena, and this is the way that shall induce him directly to his Sub pena, that is to say, when it appeareth that the plaintife shall recover by Lawe. Doct. Though the defendants may bee discharged by Sub pena, yet the bringing in of his pꝛooues there, will be to charge of

The 7. Chapter.

of the defendaunt, and also the profits may bee
or they come in. Also there is a ground in the
law of reason, *Quod nihil possumus contra ve-*
ritatem (that is) we may doe nothing against
the truth, and as he knoweth it is truth that
the money is paid, he may do nothing against
the truth, and if he should be of counsaile with
the plaintife, he must suppose and asserre that
it is the very due debt of the plaintife, and that
the defendant withholdeth it from him unlaw-
fully, which he knoweth himselfe to be untrue,
wherefore he may not with conscience in this
case be of counsaile with the plaintife, knowing
that the plaintife is paid already, wherefore
if thou be contented with this answer, I pray
thee proceed to some other question. S. I will
with good will.

¶ The 7. question of the Student.

Cap. 7.

A Man maketh a feoffment to the use of him
& of his heires, & after the feoffor putteth
in his beasts to manure the ground, & the
feoffee taketh the same as damages fevant, & putteth
the in pound, & the feoffor bringeth an action of
trespass against him for entering into his ground
&c. whether may any man knowing the sayde
use, be of counsaile with the feoffee to avoid the
action? D. May he by the common lawe avoid
that action seeing that the feffor ought in con-
science to haue the profits? S. Ye verely, for as
to the common Lawe the whole interest is in
the

the lessee, and if the lessee will breake his conscience, and take the profits, the lessour hath no remedy by the common Lawe, but is driven in that case to sue for his remedie by sub pena for the profits, and to cause him to rescosse him againe, & that was sometime the most common case where the sub pena was sued, that is to say, before the Statute of R. 3. but since the statute, the lessor may lawfully make a feoffment. But neuertheless for the profits receiued, the lessor hath yet no remedy but by sub pena as hee had before the said statute. And so the supposel of this action of trespass is untrue in euery point, as to the common law.

D. Though the act be untrue as to lawe yet he that sueth it ought in conscience to haue that he demandeth by the action, that is to say, damages for the profits, and as it seemeth no man may with conscience giue counsaile against that he knoweth conscience would haue done.

S. Though conscience would hee should haue the profits, yet conscience will not that for the obtaining thereof the lessour should make an untrue surmise. Therefore against the untrue surmise euery man may with conscience giue his counsaile, for in that doing he resisteth not the plaintife to haue the profits, but hee withstandeth him that hee should not maintaine an untrue action for the profits. And it sufficeth not in the Law, ne yet in conscience as me seemeth, that a man hath right to that hee sueth for, but that also hee sue by a iust meanes, and that he hath both good right, and also a good and a true conscience to come to his right: for

The 7. Chapter.

if a man haue right to lands as heire to his father, and he wil bring an action as heire to his mother that neuer had right, euerie man may giue counsel against the actiō though he know he haue right by another meanes, and so as we thinketh he may doe in dilatozies, whereby the partie may take hurt if it were not pleaded, though he knew the plaintife haue right, as if the partie o: the towne bee misnamed, o: if the degrees in Writs of Entre be mistake, but if a party should take no hurt by admitting of a dilatoz, there hee that knoweth that the plaintife hath right may not pleade that dilatoz with conscience: As in a Formedon to plead in abatement of the Writ because hee hath not made himselfe heire to him that was last seised, o: in a Writ of right for that the demandant hath omitted one he intended right ne such other, ne he may not assent to the casting of an essoign nor protection for him if hee knew that the demandant hath right, ne he may not vouch for him, except it be that he knoweth that the tenant hath a true cause of a voucher, & of lien, & that he doth it to bring him thereto, and in like wise he may not pray in aid for him, vntles he know the prater haue good cause of voucher & lien o: uer, o: that he knoweth that the prater hath some what to pleade that the tenant may not pleade, as billaine in the demandant, o: such other. D. Though the plaintife hath brought an action that is untrue & not maintainable in the Law, yet the defendant doeth wrong to the plaintife in the withholding of the profits aswell before the action brought as hanging the action, and that

that wrong as it seemeth the counsaillor doeth maintaine & also he weth himself to fauour the party in that wrong when hee giueth counsaile against the action. *Sc.* If the plaintife doe take that for a fauor & a maintenance of his wrong hee iudgeth farther then the cause is giuen, so that the counsaillor doe no moze but giue counsaile against the action, for though he giue him counsaile to withstande the action for the vntuth of it, and that hee should not confesse it & to make thereby a fine to the King without cause, yet it may stande with reason that hee may giue counsell to the party to recel the profits, and therefore I thinke he may in this case be of counsaile with him at the common Law, and be against him in the Chauncerie, and in eyther Court giue his counsaile without any contrariety, or hurt of conscience. And vpon this ground it is, that a man may with good conscience be of counsaile with him that hath land by descent, or by a discontinuance without title, if he that hath the right bring not his action according to the law, for the recouering of his right in that behalfe.

¶ The seauenth question of the Student.

Cap. 8.

If a mā take distress for debt vpon an obligation, or vpon a contract, or such other thing he hath right title to haue, but he ought not by law to distraine for it, & neuertheles he keepeth

The 8. Chapter.

eth the same distresse in pound til he be paid of his duety, what restitution is he bound to make in this case, whether shal he repay h^e money because he is come to it by an unlawfull meanes, or onely to restore the party for the wrongfull taking of the distres, or for neither, I pray you shew me. D. What is the Law in this case? S. That he that is distrained may bring a special action of trespassse against him h^e distraineth, for h^e he tooke his w^{al}les wrongfully, & kept them til he made a fine, & therfore he shall recover the fine in damages, as he shal do for the residue of trespass, for the taking of the money by such compulsion is taken in h^e law but as a fine wrongfully taken, though it be his duety to have it. D. Yet though he may so recoure, mee thinketh that as to the repayment of the money he is not bound thereto in conscience, so that hee take no more then of right he ought to have, for though he come to it by an unlawfull meane, yet when the money is paid him, it is his of right, & he is not bound to repay it, unles it be recovered as thou saidst, & then when he hath repaid it, hee is as mee thinketh restored to his first action: but to the redelivery of the beasts with such damages & such hurt as hee hath by h^e distres, I suppose he is bound to make redempce of the in conscience without compulsion or suit in h^e law, for though hee might lawfully have sued for his duety in such maner as the law hath ordred, yet I agree well that he may not take upon him to be his owne iudge, and to come to his duety against the order of the Law, and therefore if any hurt come to the party by the disorder, he is bound to restore

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restore it. But I would think it were the more doubt if a man tooke such a distresse for a trespass done to him, and keepeth the distresse till as much be made for the trespass, for in case that the damages be not in certain, but be arbitrable either by the assent of the parties or by 12. men, and it seemeth that there is no assent of the parties in this case speciallie no free assent, for that hee doth is by compulsion and to haue his distresse againe, & so his assent is not much to be pondered in that case, for all his assenting of him that tooke the distress, and so he hath made him selfe his owne Judge and that is prohibited in all lawes, but in that case where the distress is take for debt, he is not his own iudge, for the debt was Judged in certaine before by the first contract, and therefore some thinke great diversity betwixt the cases. Sc. By that reason it seemeth that if hee that distraineth in the first case for the debt take anything for his damages, that he is bound in conscience to restore it againe, for damages be arbitrable and not certaine no more then trespass is, & mee seemeth that both in the case of trespass and debt, he is bound in conscience to restore that he taketh, for though he ought in right to haue like sum as hee receiueth, yet he ought not to haue the money that he receiueth, for hee came to the money by an vnjust meanes, wherefore it seemeth he ought to restore it againe. Do. And if hee should be compelled to restore it againe, should he not yet (for that hee receiued it once) be barred of his first action notwithstanding the payment.

The 9. Chapter.

S. I wil not at this time cleerely assoltte thee that question, but this I will say that if any hurt come to him thereby, it is through his owne default, for that he would do against the Law, but neuertheles a little I will say to the question, that as me seemeth when he hath repayed the money that he is restozed to his first action. As if a man condemned in an action of trespas pay the mony, and after the defendant reuerse the iudgement by a writ of Error, and haue his money repaid, then the plaintife is restozed to his first action. And therefore if hee that in this case tooke the mony, restoze that he tooke by the wrongfull distress: or that he ordered the matter so liberally that the other murmure not, ne complaine not at it, me seemeth he did very well to bee sure in conscience: & therefore I would aduise euery man to be wel ware how he distraineth in such case against the law. D. Thy counsel is good & I note much in this case that the party may haue an action of trespas against him that distraineth, so that he is taken in the law but as a wrong doer, & therefore to paye the money againe is the sure way as thou hast said before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

¶ For what thing a man may lawfully distraine.

Cap. 9.

A Man may lawfully distraine for a Rent service and for all maner of seruices, as homage,

mage, fealty, Escuage, suit of Court, relieves, and such other. Also for a rent reserved upon a gift in tail, a lease for term of life, for yeeres, or at will, if hee reserve the reversion, the lessor shall distraine of common right though there bee no distresse spoken of. But in case a man make a feoffment and that in fee by Indenture, reserving a rent, he shall not distraine for that rent unless a distresse bee expressely reserved, and if the feoffment bee made without a dede reserving a rent, that reservation is boide in the Lawe, and he shall have the rent onely in conscience and shall not distraine for it, And like Lawe is where a gift in tail or a lease for terme of life is made the remainder over in fee reserving a rent, that reservation is boide in the law.

Also if a man seyled of land for terme of life graunteth away his whole Estate reserving a rent, that reservation is boide in the Lawe without it be by Indenture, and if it be by Indenture, yet he shall not distraine for the rent but a distresse be reserved. Also for Amerciamment in a Leete, the Lord shall distraine. But for Amerciamment in a Court baron he shal not distraine.

Also if a man make a lease at Michaelmas for a yeare, reserving a rent payable at the feast of the Invention of our Lady and Saint Mich. the Archangell, in that case he shall distraine for the rent due at our Lady day, but not for the rent due at Michaelmas because the terme is expired.

But if a man make a lease at the feast of
 & ij. Christ.

The 9. Chapter.

Christmas for to endure to the feast of Christmas next following, that is to say for a yeare, reseruing a rent at the aforesaid feast of the Annunciation of our Ladye and Saint Michael the Archangel, there hee shall distraine for both the rentes as long as the terme continued, that is to say, till that aforesaid feast of Christmas.

And if a man haue land for terme of lyfe of John at Stoke and maketh a lease for terme of yeeres reseruing a rent, the rent is behinde and John at Stoke dieth, there he shal not distraine because his reuerſion is determined.

Also if he to whose vse feffres him seiled maketh a lease for terme of yeeres, or for terme of lyfe, or a gift in taile reseruing a rent, there the reservation is good and the lessour shall distraine.

And if a towneſhip be amerced & the neighbours by assent asseſſe a certaine summe vpon euery inhabitant, & agree that if it be not payde by such a day, that certaine persons thereto assigned shal distraine. In this case the distresse is lawfull. If Lord and Tenant be, and if the tenant do hold of the Lord by fealtie and rent, and the Lord doth graunt away the fealtie reseruing the rent, and the ternaunt attourneth, in this case he that was Lord may not distraine for the rent, for it is become a rent secke. But if a man make a gift in taile to another, reseruing fealty and certeine rent, and after that he graunteth away the fealtie reseruing the rent and the reuerſion to him selfe, in this case hee shall distraine for the rent, for the grant of the fealtie

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fealtie is boyde, for the fealtie cannot be seuered from the reuersion. Also for heriotte seruice the Lord shall distraine & for heriotte custom he shall lease and not distraine: Also if a rent bee assigned to make a partition or assignement of Dowry egall, hee or shee to whom that rent is assigned may distraine, and in al these cases as bouesaid, where a man may distraine, he may not distraine in the night, but for damages feasant, that is to say, where beastes doe hurt in his ground he may distraine in the night. Also for wassettes, for reparations, for accomptes, for debtes bypon contractes, or such other, no man may lawfully distraine.

¶ The 8. question of the Student.

Cap. 10.

If a man doe trespasse and after make his exrecutozs and die befoze any amends made, whether be his exrecutozs bound in conscience to make amendes for the trespasse if they haue sufficient goods thereto, though there be no remedy against them by the law to compell them to it. Do. It is no doubt but they are bounde thereto in conscience befoze any other deepe in charitie that they may do for him of their owne deuotion. Sc. Then would I wit if the testator made legacies by his will, whether the exrecutozs be bound to doe first, that is to say, to make amendes for the trespasse, or to pay the legacies, in case they haue no goods to do both. D. To pay legacies: for if they should first
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The 10. Chapter.

make recompence for the Trespasse and then haue not sufficient to pay the legacies, they should be taken in the law as waisters of their testators goods, for they were not compellable by no law to make amends for the trespas, because euery trespasse dieth with the person, but the legacies they should bee compelled by the law spirituall to fulfill, and so they should bee compelled to paye the legacies of their owne goods, and they shall not be compelled thereto by no Lawe ne conscience, but if the case were that he leaue sufficient goods to doe both, then we thinketh they be bound to do both, and that they bee bound to make amends for the Trespasse before they may doe any other charitable deede for the Testator of their owne minde, as I haue said before, except the funeral expences that be necessary which must be allowed before all other thinges. S. And what the p:ouing of the Testament?

D. The Ordinary may nothing take by conscience therefore, if there be not sufficient goods besides for the funerals to pay the debts, & to make restitution. And in likewise the Executors be bound to pay debts vpon a simple contract before any other deede of charitie that they may doe for their Testator of their owne deuotion, though they shall not bee compelled thereto by the Law. S. And whether thinkest thou that they be bound to doe first, that is to say, to make amends for the trespas, or to pay the debts vpon a simple contract. Do. To pay the debts, for that is certain and the trespasse is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and other like, I pray thee shew me the mind by what law it is that if a man make executors, and that the Executors if they take upon them bee bound to performe the will and dispose the goods that remaine for the Testator. Do. I thinke that it is best by the law of reason. Sr. And mee thinketh that it should bee rather by the custome of the Realme. D. In all Countries and in all landes they make executors. S. That seemeth to be rather by a general custome, after that the law and custome of propertie was brought in, then by the lawe of reason, for as long as al things were in common, there were no executors ne wills, ne they needed not them, and when propertie was after brought in, me thinketh that yet making of executors and disposing of goods by will after a mans death followeth not necessarily therupō, for it might haue bin made for a law that a mā should haue had the property of his goods only during his life, and that then his debts paid all his goods to haue been left to his wife and children or next of his kin without any legacies making thereof, and so might it now bee ordained by Statute, and the Statute good & not against reason, wherfore it appeareth that executors haue no authoritie by the Lawe of reason, but by the Lawe of man. And by the olde Lawe and custome of the Realme a man may make executors and dispose his goods by his will, and then his executors shall haue the execution thereof, and his heires shall haue nothing, but if any particular custome helpe, and

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The 10. Chapter.

the executors shall also haue the whole possession and dispositiō of al his goods and chattels aswel real as personal, though no word bee expressly spoken in the will, that they shall haue them, and they shall haue also actions to recouer all debts due to the testator, though all debts & legacies of the testator be paid before, and shall haue the disposition of them to the vse of the testator & not to their owne vse, and so me thinketh that the authoritē to make executors, and that they shall dispose the goodes for the testator, is by the custome of the Realme: But then I thinke as thou sayest, that by the Lawe of God they shall be bound to doe the first, that is to the most profit of the soule of their testatour where the disposition therof is left to their discretion, and that I agree well is to pay debts vpon contracts & to make amēdes for wrong don to the testator though they be not compelled thereto by the law & custome of the Realme, if there bee none other debt nor legacy that they be bound to pay by the law: but if two severall debts be payable by the law, then which debt they shall do first in conscience, I am somewhat in doubt. D. Let vs first know what the common law is therein. Sr. The common law is, & if the testatour owe x. li. to two men severallie by obligation or by such other manner that an action lyeth against his Executors thereof by the Lawe, and he leaueth goodes to pay the one and not both, that in that case he that can first obtaine his Iudgement against the Executors, shall haue execution of the whole, and the other shall haue nothing, but to which of them

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them he shall in conscience owe his fauour, the common Law reacheth not. D. Therein must be considered the cause why the Debts began, and then hee must after conscience beare his lawfull fauour to him that hath the clearest cause of debt, and if both haue like cause, then in conscience hee must beare his fauour where is most need and greatest charity.

Stu. May the Executors in that case delay that action that is first taken, if it stand not with so good conscience to be payed, as an other debt whereof no action is brought, and procure that an action may be brought thereof, and then to confesse that action, that he may so haue execution, and then the executors to be discharged against the other. Do. Why may he not in that case pay thother without action, and so be discharged in the law against the first?

Stu. No verie, for after an action is taken, the executor may not minister the goods so, but that hee leaue so much as shall paye the debt whereof the action is taken, and if hee doe not, hee shall pay it of his owne goodes, except an other recover and haue Judgement against him hanging that action, and that without co-
uin.

D. Then to answer to thy question, I thinke that he delays that be lawfull, as by Effoime Emprallance, or by Dilatory ples in abatement of the writ that is true, he may delay it: but hee may plead no vnttrue ples to preferre the other to his duetie. But I pray thee what is the law of legacies, restitution, & debts, upon contracts, that percase ought rather after charitie
to

The 10. Chapter.

to be paid then a debt vpon an obligation, whae may the fauor of the Executor doe in these cases. S. Nothing, for if they either performe legacies, make restitutions, or pay debtes vpon contracts, and keepe not sufficient to pay debtes which they are compellable by the law to pay, that shalbe taken as a Deuastauerunt bona testatoris, that is to say, that they haue wasted the goods of their Testator, and therefore they shalbe compelled to pay the debtes of their own goods, & so it is if they pay a debt vpon an Obligation wherof the day is yet to come though it be the cleerer debt, and that bee the more charitable to haue it paid. D. Yet in that case if he to whom the debt is already owing, forbear till after the day of the other Obligation is past, then he may pay him without danger. S. That is true, if there bee no action taken vpon it, and though there be, yet if that action may bee delayed by lawfull meanes, as thou hast spoken of before, till after the day, and that an action is taken vpon it, then may the executor confesse the action, and then after Iudgement he may pay the debt without danger of the law. D. Is not that confessing of the action so done of purpose, a couin in the Law? St. No verily, for couin is where the action is vnttrue, & not where the Executors beare a lawfull fauor. Do. The Ordinary vpon the accompt in all the case before rehearsed, will regard much what is best for the Testatour. St. But hee may not daine them to accompt against the order of the common Law.

¶ The

¶ The 9. question of the Student.

Cap. 11.

A Man is indebted to another by a simple contract in xx. li. & he maketh his will & bequeath xx. li. to W. Hart & dieth, & leaveth goodes to his executors only to burie him with, & to performe the said legacie, & after the said Executors deliuer the goodes of their Testatour in performance of the sayd bequest, whether is hee to whom the bequest is made, bound in conscience to pay the sayd debt vpon the simple contract to the sayde Henry Hart or not? D. Is he not bound thereto by the Law? St. No verily. Do. And what thinkest thou hee is in conscience? St. I think that he is not bound thereto in conscience, for hee is neither Distributarie, Administratour, nor Executour. And I haue not heard that any man is bound to pay debtes of any man that is deceased, but he be one of those thre, for the goodes that the testatour left to the Executors were neuer charged with the debt, but the person of the Testatour while he liued was onely charged with the debt, and not his goodes, and his executors that represent his estate after his death, hauing goodes therto of the testatours, be charged also with the debtes, and not the goodes. And therefore if an Executour giue away or sell all the goodes of the Testatour, or otherwise wast them, hee that hath the goodes is not charged with the debtes in Lawe nor conscience, but the Executors shall bee charged of their owne goodes

The II. Chapter.

goods. And in likewise if Jo. at Stoke owe to A. B. xx. li. and A. B. oweth to C. D. xx. li. and after A. B. dieth intestate hauing none other goods but the said xx. li. which the sayd John at Stoke oweth him, yet the sayd C. D. shall haue no remedie against the said Jo. at Stoke, for he standeth not charged to him in lawe nor conscience. But the Ordinary in this case must commit Administration of the goodes of the said A. B. And the sayd Administratour must leue the money of the said John at Stoke and pay it to the said C. D. And the said Jo. at Stoke shall not pay it himselfe, because hee is not charged therewith to him, and no moze mee thinketh in this case, that he to whom the bequest is made, is neyther charged to him that the money was owing to, in the Law or conscience. Do. Then shewe mee thy minde by what law it is groundes as thou thinkest that Executors be bound to pay debtes before legacies, whether it is by the law of God, or by the law of reason, or by the Law of man, as thou thinkest? S. I thinke that it is both by the lawe of reason, & by the law of God, for reason will that they shall doe first that is best for the testatour, and that is to pay debtes that his testatour is bound to pay before legacies that hee is not bound to. And also by the law of God, they are bound to pay the debtes first, for sth they are bound by the law of God to loue their neyghbour, they are bound to do for him that shall be best for him when they haue taken the charge thereto, as Executors doe when they agree to take the charge of the will of their Testatour
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upon them, and it is better for the testator that his debts be paid (wherefore his soule shall suffer paine) then that his legacies be performed, wherefore hee shall suffer no paine for the performing of them.

And that it is to be vnderstood where the legacie is made of his owne free wil & not where it is made as a satisfaction of any duettie. And after the saying of S. Gregoric, the very true prooffe of loue is the deed, But this man is not in that case, for he tooke neuer the charge vpon him to pay the debtes of the Testatur; And therefore hee is not bound to them in Law nor conscience as me seemeth: But rather the Executors should haue bin ware ere they had paid the legacies, seeing there were debtes to pay. Do. The Executors might no otherwise haue done in this case but to paie the Legacies, for then they should haue bin compelled by the Law to haue paid, and so they could not haue bin to haue paid the debt vpon a contract. And therefore they did wel in performing of that legacy, but hee to whom the legacy was made ought not to haue taken them but ought in conscience to haue suffered them to haue gone to the payment of the debt, & sith hee did not so but tooke them where he had no right to them, it seemeth that when he tooke them, hee tooke with them the charge in conscience to pay the debt, for sith the executors were compellable by the Law to performe that bequest and not to pay the debt, therefore when they perfourme that bequest, they were discharged thereby againt him that the debt was owing to, in the Law and conscience

The II. Chapter.

science, and then the charge resteth vpon him that tooke the goods where he ought not in conscience to haue taken them, but if it had beene a debt vpon an Obligation or such other debt whereupon remedie hath been had against the executors by the Law, I there suppose though that the executors had perfourmed the legacy, that yet he to whom the legacie was made and perfourmed, had not bin charged in conscience to the payment of the debt, for the Executours stood still charged thereto of their owne goods, and hee to whom the bequest was made was only bound in conscience to repay that he receiued, to the Executors, because hee had no right to haue receiued it, for against the Executours hee had no right thereto. *Str.* Then it seemeth in this case that in likewise he to whom the bequest was made, should repay that hee receiued to the Executors, and then they to pay it rather then he. *D.* The executors haue no farther meddling with it as this case is, for when they perfourmed the bequest they were discharged against both the other in Law and conscience, & also he to whom the bequest was made, stood not in this case charged to the executors, for against them he had good title by the lawe, and so this charge standeth onely against him that the debt is owing to: and the same Law that is in this case vpon a debt vpon a contract is if the testator had done a trespassse whereupon hee ought to haue made restitution, that is to say, that he to whom the bequest is made, is bounde to make the amends for the Trespassse, for it should bee no discharge to him to pay

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pay it againe to the Executours without they payde it ouer, & it were vncertaine to him whether they should pay it or not.

And therefore to be out of perill, it is necessary that he pay it himselfe, and then he is surely discharged againt all men.

¶ The 10. question of the Student.

Cap. 12.

A Man seised of certein lād in his demesne as of fee, hath issue two sonnes and dieth seised, after whose death a stranger abateeth, & taketh the profit, and after the eldest son dyeth without issue, and his brother byingeth an Alsife of Mortdaunceker as sonne & heire to his father, not making mention of his brother and recouereth the land with damages from the death of his father, as he may well by the Law, whether in this case is the younger brother bound in conscience to pay to the Executors of the eldest brother the value of the profits of the sayd land that belongeth to the eldest brother in his life or not? Do. What is thine opinion therein? S. That like as the sayd profits belong of right to the eldest brother in his life, and that hee had full authoritie to haue released aswell the right of the sayd land as of the sayd profits, which release should haue been a cleere barre to the younger brother for ever: That the right of the sayd damages which

The 12. Chapter.

which be in the Lawe but a chattell, belong to his executors and not to the heire, for no manner of chattell neither real nor personal shal not after the Lawe of the Realme descend vnto the heire.

D. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make executors, and dispose his goods by his wil, & the executors shall haue his goods to dispose, but by the law of man: And if it be left to the determination of the law of man: That in such cases as the law giueth such chattels vnto the Executors, they shall haue good right vnto them, and in such cases as the Law taketh such chattels from them, they beene rightfully taken from them: And therefore it is thought by many, that if a man sue a Writ of right of Ward of a Ward that he hath by his owne fee, and death hanging the writ, and his heire sue a Resummons according to the Statute of West. second, and recouereth, that in that case the heire shall introy the wardship against the executors, and yet it is but a chattell, and they take the reason to bee because of the sayde Statute, and so might it bee ordained by Statute that all wards should go to the heires, and not to the Executors: Right so in this case, sth the Law is such, that the younger brother shal in this case haue an Alsise of Mortdaunceller as heire to his father, not making any mention of his elder brother, and recouer damages aswel in the time of his brother, as in his owne time: It appeareth that the Lawe giueth the right of these damages to the heire, and therefore

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for no recompence ought to bee made to the ex-
ecutors, as me seemeth, & it is not like to a writ
of Heir, whereas I haue learned in Latin (As
our first dialogue) the demandant shal recouer
damages onely from the death of his father, if
hee ouerliue the Heir, & the cause is, for that the
demandant, though his Heir ouerliued his fa-
ther, must of necessity make his conuoyance by
his father, and must make himselfe same & heir
to his father, & coheir and heir to his Heir, and
therefore in that case if the father ouerliued the
Heir, the abator were bounden in conscience to
restore to the executors of the father the profits
run in his time (for no law taketh them from
him) but otherwise it is in this case, as mee see-
meth. S. If the younger brother in this case had
entred into the lande without taking any assise
of Mortdancester as he might if hee would, to
whom were the abator then bounden to make
restitution for those profits as thou thinkest?
D. To the executors of the eldest brother, for in
that case there is no law that taketh the from
them, & therefore the general ground, which is
that all chattels shall go to the executors, hol-
deth in that case: but in this case that ground is
broken and holdeth not, for the reason that I
haue made before, for commonly there is no
generall ground in the Law so sure, but it fail-
eth in some particuler case.

¶ The 11. question of the Student.

Cap. 13.

A Man seised of land in fee taketh a wife, and
after alieneth the land, & dyeth, after whose
death

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The 13. Chapter.

Death his wife asketh her dower, & the alienee refuseth to assigne it vnto her, but after shee asketh her Dower again, and he assigneth it vnto her, whether is the alienee in this case bound in conscience to giue the woman damages for the profittes of the lande after her third part from the death of her husband, or from the first request of her dower, or neyther the one nor the other? *D.* What is the lawe in this case? *Sci.* By the Law the woman shall recouer no damages, for at the Common Law the demandant in a Writ of Dower should neuer haue recovered damages. But by the Statute of Merton it is ordeined, that tohere the husband dyeth seised, that the woman shall recouer damages which is vnderstood the profittes of the lande sith the death of her husband, and such damages as she hath by the forbearing of it, but in this case the husband dyed not seised, wherefoze shee shall recouer no damages by the Lawe. *Do.* Yet the Law is, that immediatly after the death of her husband the Wife ought of right to haue her dower if she aske it, though her husband die not seised. *S.* That is true.

Do. And sith shee ought to haue her dower from the death of her husbände, it seemeth that she ought in conscience to haue also the profittes from the death of her husbände, though shee haue no remedye to come to them by the Lawe: For me thinketh that this case is like to a case that thou putttest in our first Dialogue in Latin, the 17. Chapter: That if a tenant for term of life be disseised and dye, and the disseisor dyeth, and his heire entreateth and taketh the profits,

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first, and after he in the reuerſion recovereth the
 landes against the heire, as hee ought to do by
 the Lawe, that in that case hee shall recour no
 damages by the Law. And yet thou diddest as-
 gree that in that case the heire is bound in con-
 ſcience to pay the damages to the demandant,
 and so me thinketh in this case that the feoffee
 ought in conscience to pay the damages from
 the death of her husband, seeing that immedi-
 atly after his death she ought to haue her dower.
 Sec. Though she ought to be indowed im-
 mediately after the death of her husbände, yet
 shee can lay no default in the feoffee till she de-
 mand her dower vpon the ground, and that the
 tenant be not there to assigne it, or if he be there
 that he will not assigne it: for hee that hath the
 possession of land whereunto any woman hath
 title of dower, hath good authority as against
 her to take & profits till she require her dower:
 for every woman that demaundeth dower as-
 firmeth the possession of the tenant as against
 her, and therfore although she recover by acti-
 on, shee leaueth the reuerſion alway in him a-
 gainst whom she recovereth, though he be a dis-
 seisor, and bringeth not the reuerſion by her re-
 couery to him that hath right as other tenants
 for terme of life doe. And for this reason it is
 that the tenant in a Writ of Dower, where
 the husband dyed seised if he appeare the first
 day, may say to excuse himselfe of damages
 that hee is and all times hath bene ready to
 paye Dower if it had been demaunded, and so
 he shall not be receiued to do in a writ of Collu-
 sage, neyther in the case that thou remembreſt

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The 13. Chapter.

aboue, for in both cases the tenants be supposed
by the writ to bee wrong doers, but it is not so
in this case, and so mee thinketh it cleere that h
fesse in this case shal neuer bee bound by law,
nor conscience to yeld damages for the time that
passed before the request, but for the time after
h request is greater doubt, howbeit some thin
keth him not there bound to yeld damages, be-
cause his title is good, as is said before, & that
it is her default that she brought not her acti-
on. D. As vnto the time before the request I
holde me content with thine opinion so that he
assign the dower when he is required, but whē
he refuseth to assign it, the I think him bound
in conscience to yeld damages for both times,
though he shall none recover by the law. And
first as for the time after the refusell, it appea-
reth evidently that when hee denied to assigne
her dower, he did against conscience, for he did
not h he ought to haue done by h law, ne as hee
would should haue bin done to him, & so after h
request he holdeth her dower from her wrong-
fully, and ought in conscience to yeld damages
therfore. And as to the default h thou assignest
in her, that she tooke not her action, h forceth li-
tle, for actiōs need not but where the party wil
not do that he ought to doe of right. And for h
he ought of right to haue done & did it not, hee
can take no aduantage, & then as to the dama-
ges before the request, me thinketh him also
bounden to pay them, for when he was requi-
red to assign dower and refused, It appeareth
that he neuer intended to yeld dower from the
beginning, & so he is a wrong doer in his own
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conscience: & moreover, if \bar{h} husband die seised, the law is such, that if the tenant refuse to assigne dower when he is required, wherefore the woman, bringeth a writ of dower against him, \bar{h} in that case the woman shall recover damages aswel for \bar{h} time before \bar{h} request as after, & yet he ought not in that case after thine opinion to have peeld any manner of damages if hee had bin ready to assigne dower whē it was demanded, as some thinketh here. S. The cause in the case that thou hast put, is for that the statute is general that the demandant shall recover damages, where \bar{h} husband died seised, & that statute hath bin alway construed \bar{h} where the tenant may not say \bar{h} he is, & hath bin alway ready to peeld dower &c. \bar{h} the demandant shall recover damages from the death of her husband. But in this case there is no law of the realme \bar{h} helpeeth for the demandant neither comon law, nor statute: & furthermore though it might be proued by his refusal \bar{h} he neuer intended from the death of the husband to assigne her dower, yet that proueth not, but that he had good right to take the profits of her thirde part for the time, aswel as he had of his owne two parts, till request be made, as is aforesaid, & so me thinketh \bar{h} notwithstanding the demall, he is not bound to peeld damages in this case, but for the time of the request, & not for the time before. D. For this time I am content with thy reason.

¶ The 12. question of the Student.

Cap. 14.

A Man seised of certain lands knowing that another hath good right & title to them leueth

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The 14. Chapter. 5

ueth a fine with Proclamation to the intent
he would extinct the right of the other man, and
the other man maketh no clayme within the v.
yeeres, whether may hee that leued the fine
hold the land in conscience as he may do by the
law? D. By this question it seemeth that thou
doest agree that if hee that leued the fine had
no knowledge of the other mans right, that
his right should then be extincted by the fine
in conscience. Stu. Ye verily, for thou diddest
shew a reasonable cause why it should bee so in
our first Dialogue in Latine the 24. Chapter,
as there appeareth. But if he that leued a fine
and that would extinct the right of an other,
knowing that the other had more right then
he, then I doubt therein, for I take thine opi-
nion in our first Dialogue to be understood in
conscience, where he that would extinct former
rightes by such a fine with Proclamation,
knoweth not of any former title, but for this
more surely, if any such former right be, hee ta-
keth the remedy that is ordained by the Law.
D. Whether dost thou meane in this case that
thou puttest now that hee hath right, know-
eth of the fine and wilfully letting the v. yeeres
passe without clayme, or that hee knoweth not
any thing of the fine?

St. I pray thee let mee know thine opinion
in both cases and whether thou thinke that
hee that hath right bee barred in eyther of the
saped cases by conscience as hee is by the Law
or not. Doct. I will with good will hereafter
shew thee my minde therein: but at this time
I pray thee giue a litle sparing and procede
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now for this time to some other question.

¶ The 13. question of the Student.

Cap. 15.

A Man seised of certain lands in fee hath a daughter, which is his heir apparrant, the daughter taketh a husband, & they haue issue, the father dieth seised, and the husband as soone as he heareth of his death, goeth toward the land to take possession, & before he can come there, his wife dieth, whether ought he to haue the land in conscience for terme of his life, as tenant by the curtesie, because he hath done & in him was to haue had possess. in his wifes life, so that hee might haue bin tenant by the curtesie according to the Lawe, or that he shall neiether haue it by the law, nor conscience. Do. *2 R. fol. 90.* Is it cleerely holden in the law that he shall not bee tenant by the curtesie in this case, because hee had not possession in deed?

S. Ye verily, and yet vpon a possession in law a woman shall haue her dower, but no man shall bee tenant by the curtesie of lande, without his wife haue possession in deede. D. A man shall be tenant by the curtesie of a rent though his wife dye before the day of payment, & in likewise of an Adowson though shee dye before the avoidance. S. That is truth, for the old custom and Maxime of the law is, that he shall be so, but of land there is no Maxime that serueth him but his wife haue possession in deed. Do. And what is the reason that there is such a maxime in the

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The 15. Chapter.

law of the rent & of the aduowson, neyther the
of land, when the husband doth as much as in
him is to haue possession and cannot. S. Some
assigne the reason to be because it is impossible
to haue possession in deede of the rent or of ad-
uowson befoze the day of payment of the rent,
or befoze h̄ auordāce of the aduowson. D. And
so it is impossible that he should haue possessiō
in deede of land if his wife die so soone that he
may not by possibility come to the lande after
his fathers death, & in her life as the case is. S.
The law is such as I haue shewed thee befoze
and I take the very cause to be for that there is
a Maximē serueth for the rent and the aduow-
son, and not for the lāds as I haue said befoze,
and as it sayd in the 8. Chap. of our first Dia-
logue, it is not alway necessarie to assigne a
reason or consideration why the Maximēs of
the lawe of England were first ordeined & ad-
mitted for Maximēs, but it sufficeth that they
haue bin alway taken for law and that they be
neither contrary to the law of reason, nor to h̄
law of God as this Maximē is not. & therfoze
if the husband in this case be not holpen by cō-
science, he cannot be holpen by the law. D. And
if the law help him not, conscience cannot helpe
him in this case, for conscience must alway be
grounded vpon some law, and it cannot in this
case be grounded vpon the lawe of reason, nor
vpon the Law of God, for it is not directly by
those laws, that a man shal be tenant by curte-
sie, but by the custome of the realme. And ther-
foze if the custome help him not, he can nothing
haue in this case by conscience, for conscience
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 ſelfe directly againſt the law of reaſon, or elſe
 the law of God, and then properly it cannot be
 called a law, but a corruption, or where the ge-
 neral grounds of the law of man worke in
 any particular caſe againſt the ſayd Lawes as
 it may doe, & yet the lawe good, as it appeareth
 in diuers places in our firſt dialogue in latin,
 or elſewhere, there is no law of mā provided for
 him that hath right to a thing by ſ law of rea-
 ſon, or by the law of God. And then ſometime
 there is remedy giuen to execute that in con-
 ſcience, as by a ſub pena, but not in al caſes: for
 ſometime it ſhalbe referred to the conſcience of
 the party, & vpon this ground (that is to ſay)
 that when there is no title giuen by the com-
 mon Law, that there is no title by conſcience,
 There be diuers other caſes, whereof I ſhall
 put ſome for an example. As if a Reueſion be
 granted vnto one, but there is no attornment:
 or if a new rent be graunted by word without
 deece, there is no remedy by conſcience, vnleſſe
 the ſaid grants were made vpon conſideration
 of money, or ſuch other. And in like wiſe where
 he that is ſeiſed of lands in Fee ſimple maketh
 a will therof, that will is void in conſcience, be-
 cauſe the ground ſerueth not for him where by
 the conſcience ſhould take effect, that is to ſay,
 the law. And if the tenant make a Feoffment
 of the land that he holdeth by priority, & taketh
 eſtate againe, and dieth, (his heire within age)
 the Lord of whom the land was firſt holden by
 priority, ſhall haue no remedy, for the body by
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The 16. Chapter.

conscience, for the law that first was with him, is now against him, & therfore conscience is altered in likewise as the Law altereth. And divers and many cases like bee in the Lawe that were too long to rehearse now. And thus mee thinketh that if the Law be as thou saiest, the husband in this case hath neither right by the law, nor conscience.

¶ The 14. question of the Student.

Cap. 16.

A Rent is grated to a mā in fee to percieve of two acres of lād, & after the grātoz enfeoffeth the grauntee of one of the said acres, whether is the whole rent extinctherby in conscience as it is in the law? Do. (This case is somewhat uncertain: for it appeareth not whether the grātoz enfeoffed him on trust, or that he gaue the acre to him of his merre motion, to the vse of the sayd feoffee, or else that the feoffement was made vpon a bargain, and if it were but only a feoffment of trust, then I think the whole rent abideth in conscience though it bee extincted in the Lawe, & first that it continueth in that case in conscience, for the part that the grauntee hath to the vse of the grātoz it is euident, for he may not take the profits of the lād, and it is against conscience that he should leese both, & in likewise it abideth in conscience for the acre þ remaineth in the hands of the grāuntoz, though it be extinct in the Lawe. For there was a default in the grāuntoz that hee would make the feoffment to the grātee, as well as there was

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was in the grantee to take it. And it is no conscience that of his owne default he should take so great awaile to bee discharged of the whole rent, seeing that the feoffment was made to his owne vse. And if the feoffment were made upon a bargain & a contract betweene them, then it is to see whether they remembred the rent in their bargain, or that they remembred it not, & if they remembred in their bargain & contract, then conscience must follow the bargain; As thus, if they agreed that the grauntee should haue the rent after the portion in the other acre, then by conscience hee ought to haue it though it bee extincted in the Law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience, and if they cleerey forget it & made no mention of it, or for lacke of cunning took the Law to bee that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold: then me thinketh, it doth continue in conscience after the portion, & if the feoffment were made to the vse of the grantee, then it seemeth the whole rent is extinct in lawe and conscience. S. Then take this to be the case, that is to say, that the feoffment was made to the vse of the grantee. D. What is then thine opinion therein? S. That the rent should abide in conscience after the portion of the acre remaining in the hands of the grantor, notwithstanding it be extinct in the law. D. Then shew me thine opinion in this that I shal aske thee: Of what law is it that grauntees of rent and of such other

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The 16. Chapter.

profits out of lāds may be made, and that they
shalbe good & effectual to the grantees, whether
it is by the law of reason, or by the law of God,
or by the custome & law of the realm. S. I thinke
it is by the law of reason: for by the same reason,
that a mā may giue away all his lands, he may
as it seemeth giue away the profits thereof, or
graunt a rent out of the land if he will. D. But
then by what Lawe is it that a man may giue
away his lands? I trow by none other law but
by the custome of the Realme, for by Statute all
alienations and gifts of lands may be prohibi-
ted, & the that reason proueth not that grants
of the profits of land or of a rēt should be good
because hee may alien the land: if alienations
of land be by custome & not by the law of Rea-
son, as I suppose it is, whereof I haue tou-
ched somewhat in our first Dialogue in Latin
the 19. Chapter. And also if Grauntes should
haue their effecte by the Lawe of Reason, then
Reason would they should be good by the only
word of the graunto, as well as by his deede.
And that is not so, for without deed the grant
of rent is void in law: and so me thinketh that
grauntes haue their effect onely by the Law
of the Realme. Sen. I omit it be so, what meanest
thou thereby? Do. I shall shewe thee hereafter,
as I shal shewe thee the cause why I thinke the
rent is extinct in conscience, as well as in law.
And first as I take it, the reason why it is ex-
tinct in the law, is because the rent by the first
grant was going out of both acres, and was
not going part out of the one acre, and part out
of the other, but the whole rent was going out
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of both, and then when the grantee of his own folly will take estate in the one acre, whereby that acre is discharged, then the other acre also must be discharged, vnles it should be appoynted: and the law wil not that any appoyntment should be in that case, but rather insomuch as the partie hath by his owne acte discharged the one acre, the law discharged also the other rather then to suffer the other acre to bee charged contrarie to the forme of the graunt, For this rent beginneth all by the acte of the party. And as I haue heard, it is called a rent against common right. Wherefore it is not fauored in the law as a rent seruice is: and then mee thinketh that forasmuch as it is not groundbed by the law of reason, that graunts of rent should be made out of land, but by custome and law of the realm, as I haue said before: that so in like wise it remaineth to the law and custome of the realme, to determine how long such rents shall continue. And when the law iudgeth such rent to bee void, I suppose that so both conscience also, except the iudgment of the law be against the law of Reason or the law of God, as it is not in this case, For in this case he that taketh the ffelement hath profite by the ffelement, and knoweth that he hath such a rent out of h land, & that this purchase should extinct it, whereby it appeareth that hee assenteth vnto the Lawe, whereto he was not compelled, and that is his owne act and his owne default so to doe, which shal extinct his whole rent aswell in conscience as in law. But if he haue no profit of the land or bee ignorant that hee hath such a rent out of the

The 16. Chapter.

the lande which is called ignorance of the
 derde, or if hee bee ignorant that the Lawe
 would extinct his whole rent thereby, which is
 called ignorance of the law, then me thinketh
 it remaineth in conscience after the portion. S.
 Ignorance of the law or of \bar{h} deed helpeth not
 but in few cases in the law of Englad. D. And
 therfore it must be reformed by conscience, that
 is to say, by the law of reason, for when the ge-
 neral Maximes of the law be in any particuler
 cases against \bar{h} law of reason, as this Maxime
 seemeth to be, because it excepteth not the
 be ignorant though it bee an ignorance inin-
 scible, the doth it not agree with the law of rea-
 son. S. Me thinketh that ignorance in this case
 helpeth little: for when a man buyeth any land
 or taketh it of the gift of any other, hee taketh
 it at his perill, so that if the title be not good, ig-
 norance cannot help, for the buyer must beware
 what hee buyeth, & so in this case if the taking
 of an acre should extinct the whole rent in con-
 science, if hee were not ignorant, so me think-
 eth it should in likewise extinct it also though
 he be ignorant of the law or of the deed: for eu-
 ery man must be compelled to take notice of his
 owne title, and out of what land his rent is go-
 ing, & so me thinketh ignorance is but little to
 be considered in this case. D. If a man buy land
 or taketh it of the gift of an other it is reason
 that hee take it with the perill though hee bee
 ignorant that an other hath right, for it were
 not standing with reason that his ignorance
 should extinct the right of an other, but in this
 case there is no doubt of the right of the lande,
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but all the doubt is how the rent shal be ordred
in conscience, if hee that hath the rent take part
of the land: & therein is great diuersity between
him that is ignozant in the Law, and him that
knoweth the law, & knoweth well also that hee
hath a rent out of the land and other. For I
put case that hee asked counsaile of the graun-
to: himselfe therein, & he saying as he thought,
tolde him that the taking of the one acre should
not extinct the rent but for the portio, and so he
thinking the Law to be, tooke the other acre of
his gift: Is it not reasonable in that case, that
the ignozance should saue the rent in consci-
ence? S. Yes, for there the graunto: himselfe is
party to his ignozance, and in maner the cause
thereof. D. And mee thinketh all is one if any
other had shewed him so, or if he asked no coun-
saile at all, for mee thinketh it sufficeth in this
case that hee bee ignozant of the law: for why,
it is moze hard in this case to proue the rent
should be extinct in conscience though he knew
it should bee extinct in the Lawe, then to proue
that it continueth in conscience after the portio-
on if hee be ignozant, and thou thy selfe were of
the same opinion, as it appeareth in the begin-
ning of this present Chapter: But if the opi-
nion were true, it would be hard to proue but
that the sayd generall Maxime were wholly as
gainst reason, & then it were void; but I haue
sufficiently answered thereto as me seemeth,
& that it is extinct in the Law. & also in consci-
ence, except ignozance help it to be apporcioned.
And mozeouer, forasmuch as apporcionment
is suffered in the Lawe where part of the land
discern

The 17. Chapter.

descendeth to the grauntee, because no default be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the Law or of the deed, though such ignorance do not excuse in the law of the realme. **Sir.** I am content with the opinion in this behalfe at this time.

¶ The 13. question of the Student.

Cap. 17.

A Man granteth a Rent charge out of two acres of land, and after the grauntoz in feoffeth **H. H.** in one of the said two acres to the vse of the sayde **H. H.** and of his hetres, and after the said **H. H.** intending to extinct al the rent, causeth the said acre to be recouered against him to his owne vse in a writ of Entrie in the Post in the name of the grauntee and of others after the common course, the grauntee not knowing of it, and by force of the said recovery the other demandantes enter and die leaving the grauntee, so that the grauntoz is satisfied of all by the satisfaction to the vse of the sayde **H. H.** whether is the sayde rent extinct in conscience in part, or in all, or no part? **D.** I am in doubt of the law in this case. **S.** In what point? **D.** Whether the whole rent be going out of the acre that remaineth in the hands of the grauntoz, because the grauntee cometh to the land by way of recovery, or that it shal be extinct in law but after the portion, because the grauntee hath not the acre to his owne vse, or that the whole

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whole rent shall be extinct in the Law. S. The rent cannot be whole going out of the acre that the grauntoz hath, for this recoverie is vpon a feyned title, and the grauntoz because he is strauge to it shall be well receiued to falsifie it. But if the Recoverie had bene vpon a true title, then it had bene as thou saist, if the grauntee recover the one acre against the grantoz vpon a true Title, the grauntoz shall pay the whole rent out of that land that remaineth in his hand, and as to the vse it maketh no matter to the grauntoz as to the lawe in whom the vse bee, for the possession without the vse extinguisheth the whole rent as against him in the law as well as if the possession and vse were both ioined together in the grauntee.

Q. Do. Then we thinke that the sayd Henry Hart is bound in conscience to pay the grauntee the rent after the portion of that acre that was recovered, for it cannot stand with Conscience that hee should lose his rent and haue no profits of the land. Se. Then of whom shall he haue the other portion of his rent? D. Is the law cleere that the acre that the grauntoz hath shall be in this case discharged in the law? S. I take the lawe for it.

D. And what in conscience? S. As against the grantoz we thinke also it is extinct in conscience for the reason that thou hast made in § 16. Chapter, for it is all one in conscience in this case as against the grauntour, whether the recoverie were to the vse of the grauntee or not, specially seeing that the grauntour is not paying to the recoverer, for the unity of possession

The 18. Chapter.

is þ cause of extinguisment of the rēt against the grantor both in lawe and conscience, where soeuer the vse bee, But if the grauntoz had bin put to the cause of the extinguisment, as hee was in the case that I put in the last Chapter, where the grauntoz enfeofed the grauntee of one of the acres to the vse of the grauntee, there it is not extinct in Conscience in that acre that remaineth in the hands of the grantor, though it be extinct in the law, because he was put to the extinguisment himselfe, but he is not so in this case, & therefore it is extinct against him in law & conscience. And therfore me thinketh that the grauntee shall in Conscience haue the whole rent of the sayd by. Part, that caused the sayd recovery to be had in his name, for in him was all the default, but it is to be vnderstood that in all the cases, where it is saide before in this chapter, or in the chapter next before, that the rent is extinct in the lawe, and not in conscience, that in such case, all the remedies that the party might first haue had for the rēt at the common lawe by distresse, assise, or otherwise, are determined, & the party that ought to haue the rent in conscience, shall be bounden to sue for his remedy by Sub pena. D. I am content with the conceit in this matter for this time.

¶ The 16. question of the Student.

Cap. 18.

A Villeine is graunted to a man for terme of lefe, the villaine purchaseth landes to him
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and to his heires, the tenant for term of life entred, in this case by the law hee shall enjoy the landes to him & to his heires, whether shall he do so in likewise in conscience?

D. Wee thinke it first good to see whether it may stand with Conscience that one man may clayme an other to be his villedin, and that he may take from him his landes and goods, & put his body in prison if he will, it seemeth hee loueth not his neighbour as himselfe that doth so to him.

Sr. That Law hath bin so long vsed in this Realme and in other also, and hath bin admitted so long in the Lawes of this Realme, and of diuers other lawes also, and hath been affirmed by Bishops, Abbots, Priours, and many other men both Spirituall and Temporal which haue taken aduantage by the sayde Lawe, and haue seised the lands and goods of their villedines thereby, and call it their right inheritaunce so to do, that I thinke it not good now to make a doubt, ne to put it in argument whether it stand with conscience or not, and therefore I pray thee, admitting the lawe in that behalfe to stande in Conscience, shewe mee thine opinion in the question that I haue made.

Dnc. As the law cleere that he that hath the villedine hath it onely for the term of life, shal haue the landes that that villedine purchaseth in fee to him and to his heires.

S. We verily take it so.

D. I should haue taken the law otherwise, for

¶ 4.

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The 18. Chapter.

if a Seigniorie be granted to a man for terme of life and the tenant attourne, & after the land escheat and the tenant for terme of life entreib, he shal haue there none other estate in the land then he had in the Seigniorie, and me thinketh that it should be like law in this case, and that the Lord ought to haue in the land, but such estate as he hath in the villeine. S. The cases be not a like, for in the case of the escheate the tenant for terme of life of the Seigniorie, hath the landes in the lieu of the Seigniorie that is to say, in the place of the seigniorie, & the Seigniorie is cleerly extinct, but in this case he hath not the land in the lieu of the villeine, for he shall haue the villeine stil as he had before, but he hath the lands as a profit come by means of the villeine, which he shall haue in like case as the villein had them, that is to say, of al goods and chatels he shal haue the whole property & of a lease for terme of peeres hee shall haue the whole terme, and for terme of life he shal haue the same estate, the Lord shall haue the lande during the life of the villein, and of land in fee simple, and of an estate tayle that the villeine hath, the Lord shal haue the whole fee simple, although he had the villeine but onely for term of peeres, so that he enter or seise according to the law before the villeine alien, or else he shall haue nothing.

D. Verily, and if the law be so, I think conscience followeth the lawe therein, For admitting that a man may with conscience haue an other man to be his villein, the iudgment of the Law in this case (as to determine what estate the

the Lord hath in the land by his entry is nei-
ther against the lawe of reason nor against the
law of God, and therefore conscience must fol-
low the law of the Realme. But I pray thee
let me make a little digression to heare thine o-
pinion in an other case somewhat pertaining
to the question, and it is this, If an Executor
haue a villeine, that his testator had for terme
of yeres, & he purchaseth landes in fee, and the
executor entreth into the land, what estate hath
he by his entry. S. A fee simple, but that shall be
to the behouise of the testator, & shalbe an assets
in his hands. D. Wel then I am content with
thy conceipt at this time in this case, and I
pray thee proceede to an other question. S. For
asmuch as it appeareth in this case and in some
other befoze that the knowledge of the lawe of
England is right necessary for the good orde-
ring of the conscience: I would heare thine o-
pinion, If a man mistake the law, what danger
it is in conscience for the mistaking of it. D. I
pray thee put some case in certayne thereof that
thou doubttest in, & I will with good wil shew
thee my minde therein, or else it will be some-
what long or it can be plainly declared, and I
would not be tedious in this writing.

¶ The 17. question of the
Student.

Cap. 19.

A Man hath a Villeine for terme of life, the
villein purchaseth lands in fee as in the case
of

The 19. Chapter.

of the last Chapter, and the tenant for terme of life entereth, and after the Willaine dyeth, hee in the reuersion pꝛ:tending that the tenant for terme of life hath nothing in the lande, but for terme of life of the Willaine, asketh counsaile of one that sheweth him that he hath good right to the lande, and that hee may lawfullie enter, and thꝛough that counsaile he in the reuersion entereth, by reason of the which entrie, great suites and expences followe in the Lawe, to the great hurt of both parties, what danger is this to him that gaue the counsaile? Do. Whether meanest thou that he that gaue the counsaile, gaue it willingly against the Lawe, or that he was ignorant of the Lawe. Stu. That he was ignorant of the Lawe, for if he knewe the Law, and gaue counsaile to the contrary, I thinke him bound to restitution, both to him against whom hee gaue the counsaile, & also to his client (if hee would not haue sued but for his counsaile) of all that they bee damaged by it.

Do. Then will I yet further aske thee this question, whether he of whom hee asked counsaile gaue himselſe to learning, and to haue knowledge of the Lawe after his capacity, or that hee tooke vpon him to giue counsaile, and tooke no studie competent to haue learning: for if hee did so, I thinke he be bounden in conscience to restitution of all the costes and damages that hee sustained, to whom hee gaue counsaile, if hee would not haue sued but thꝛough his counsaile, and also to the other partie: But if a man that hath taken sufficient studie

in

in the Law, mistake the law in some point that is hard to come to the knowledge of, hee is not bounden to such restitution, for he hath done it in him is, but if such a man knowing the Law give counsaile against the lawe, he is bound in conscience to restitution of costs and damages (as thou hast said befoze) and also to make amends for the vnttruth.

St. What if he aske counsaile of one that he knoweth is not learned and hee giueth him counsaile in this case to enter, by force whereof hee entred? **Do.** Then hee they both bound in conscience to restitution, that is to say, the partie if he be sufficient, and else the Counsaillour because he assented and gaue counsaile to the wrong.

S. But what is the Counsaillour in that case bounden to him that he gaue counsaile to? **Do.** To nothing, for there was as much default in him that asked the counsaile, as in him that gaue it, for he asked counsaile of him that hee knew was ignorant, and in the other was default for the presumption, that hee would take vpon him to giue counsaile in that he was ignorant in.

St. But what if hee that gaue the counsaile knew not but that he that asked it, had trust in him, that hee could and would giue him good Counsaile, and that hee asked counsaile for to order wel his conscience, howbeit that it truth was, that he could not so doe.

D. Then is he that gaue the counsaile bounden to offer to the other amends, but yet the other may not take it in conscience.

Id id.

S. That

The 19. Chapter.

S. That were somewhat perillous, for happily he would take it though hee haue no right to it, except the world be wel amended. **D.** What thinkest thou in that amendment? **Stu.** I trust every man will doe now in this world as they should be done to, speake as they think, restore where they haue done wrong, refuse money if they haue no right to it, though it bee offered them, doe that they ought to doe by conscience, and though that they cannot be compelled to it by no Law, and that none will giue counsaile, but that they shall thinke to bee according to conscience, and if they doe, to doe what they can to reforme it, and not to intermit themselves with such matters as they be ignorant in, but in such cases to send them that aske the counsaile to other, that they shall thinke bee more cunning then they are.

D. It were very well if it were as thou hast sayd, but the more pittie, it is not alway so, And especially there is great default in giuers of counsaile, for some for their owne lucre and profite giue counsaile to comfort other to sue that they know haue no right, but I trust there be but fewe of them, and some for dread, some for fauor, some for malice, and some vpon considerations, and to haue as much done for them an other time to hyde the truth. And some take vpon them to giue counsaile in that they bee ignorant in, and yet when they know the truth will not withdraw that they haue misdone, for they thinke it should be greatly to their rebuke, and such persons follow not this counsaile that saith, That we haue vnadvisedly done,

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done, let vs with good aduise reuoke againe.
 S. And if a man giue counsaile in this Realme
 after as his learning and conscience giue:h
 him, and regardeth not the Lawes of the
 Realme, giue:h he good counsaile? Do. If the
 law of the Realme bee not in that case agaynst
 the law of God, no: agaynst the law of reason,
 hee giueth good counsaile: For enery man is
 bound to follow the law of the countrey where
 he is, so it be not agaynst the sayd Lawes, and
 so may the cases be, that hee may bind himselfe
 to restitution. Stu. At this time I will no fur-
 ther trouble thee in this question.

¶ The 18. question of the Student.

Cap. 20.

If a man of his meere motion giue lands to
 H. H. and to his heires by Indenture vpon
 a Condition that he shal yerely at a certayne
 day pay to Jo. at Stile out of the same land a
 certayne Rent, and if hee doe not, that then it
 shalbe lawfull to the said Jo. at Stile to enter
 ec. if the rent in this case be not paid to John
 at Stile, whether may the said John at Stile
 enter into the landes by conscience, though hee
 may not enter by the law? D. May he not enter
 in this case by the lawe, As the wordes of the
 Indenture be that he shall enter? S. No verely,
 for there is an auncient Maxime in the
 Lawe, that no man shall take aduantage in a
 condition but he that is partie or partie to the
 condition, and this man is not party nor partie,
 where

The 20. Chapter.

wherefore hee shall haue no aduantage of it. **D.** Though he can haue no aduantage of it as party, yet because it appeareth evidently that the intent of the giuer was, that if hee were not payed of the rent, that he should haue the land: It seemeth that in conscience he ought to haue it though hee cannot haue it by the Law. **Sc.** In many cases the intent of the partie, is void to all intents if it be not grounded according to the lawe: And therefore if a man make a Lease to an other for term of life, and after of his meere motion be confirmeth his estate for terme of life to remaine after his death to an other and to his heires, In this case that remainder is void in law and conscience, for by the lawe there can no remainder depend vpon no estate, but that the same estate beginneth at the same time that the remainder doth; And in this case the estate began before, and the confirmation enlarged not his estate, nor gaue him no new estate. But if a lease be made to a man for terme of an other mans life, and after the lessee onely of his meere motion confirmeth the lande to the lessee for terme of his owne life, the remainder ouer in fee, this is a good remainder in the law and conscience, and so mee thinketh the intent of the partie shall not be regarded in this case. **Do.** And in the first case that thou hast put, mee thinketh though it passe not by way of graunt of that, yet shall it passe, as by the way of remainder of the reuerſion, for euery deed shalbe take most strong against the graunto, and the taking of the deed in this case is an attornment in it selfe. **Sc.** That cannot

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not be, for hee in the remainder is not partie to the deed, and therfore it cannot be taken by the way of graunt of the reuerſion, for no graunts can bee made but to him that is partie to the deed, except it be by way of remainder. And therfore if a man make a lease for terme of life, and after the lesſor grant to a stranger that the tenant for terme of life shal haue the lād to him and to his heires, that graunt is void if it bee made only of his meere motion without recompence. And in likewise if a man make a Lease for terme of life, and after graunt the reuerſion to one for terme of life, the remainder ouer in fee, and the tenant returneth to him that hath the estate for terme of life onely, intending that he onely should haue aduantage of the graunt, his intent is void, & both shal take aduantage thereof, and the attornment shalbe taken good, according to the graunt: And so in this case, though the feoffour intended that if the rent were not payed, that the stranger should enter, yet because the law giueth him no entry in that case, that intent is holde, & the same stranger shal neither enter into the land by law nor conscience. Do What shal then bee done with that land as thou thinkest after the condiction broken. S. I think that the feoffour in this case may lawfully reenter, for when the feoffment was made by condition that the feoffee would pay a rent to a stranger, in those wordes is concluded in the Lawe, that if the rent were not paid to the stranger, that the feoffor should reenter, for those wordes upon condition imply so much in the law though it bee not expreſſed.

And

The 21. Chapter.

And then when the feoffor went further & sayd that if the rent were not paid, that the stranger should enter, those wordes were hold in the lawe, and so the effect of the deed stood vpon the first wordes whereby the feoffor may reenter in law & conscience: but if the first wordes had not bin conditional, I would haue holden it the greater doubt. Do. I pray thee put the case thereof in certaine with such wordes as bee not conditionall that I may the better perceiue what thou meanest therein.

¶ The 19. question of the Student.

Cap. 21.

A M^r maketh a Feoffement by deed indented, & by the same deed it is agreed, that the feoffee shall pay to A. B. & to his heirs a certaine rent yerely at certaine dates, & that if he pay not the rent, then it is agreed that A. B. or his heirs shall enter into the land, and after the feoffee payeth not the rent, then the question is, who ought in conscience to haue this land and rent. Doc. Ere wee argue what conscience will, let vs know first what the Law wil therein. S. I thinke that by the law neither the feoffor ne yet the sayde A. B. shall neuer enter into the land in this case for nonpayment of the rent, for there is no reentry in this case giuen to the feoffor for not payment of the rent as there is in the case next before, & the entry that is giuen to the said A. B. for not payment thereof is void in the law, because he is estrange to the

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the deed as it appeareth also in the next Chapter before. And therefore mee thinketh that the greatest doubt in this case is to see to what vse this feoffment shall be taken.

Do. There appeareth in this case as thou hast put it, no consideration ne recompence giuen to the feoffour, whereupon any vse may be deriued, and if the case be so indeede, and that the feoffour declared neuer his mind therein, to what vse shall it then be taken? *Sir.* I thinke it shall be taken to bee to the vse of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should bee busied with payment of the rent hauing nothing for his labor, ne it may not conueniently be taken that the intent of the feoffour was so, except hee expessed it, and then it must be taken that hee intended to recompence the feoffee for the busines that he should haue in the payment ouer, and by the wordes following his intent appeareth to bee so as mee thinketh, for if the rent were not paid, he would that *B. B.* should enter, and so it seemeth he intended not to haue any vse himselfe, and thus me seemeth this case should varie from the common case of vses, that is to say, if a man seised of land make a feoffment thereof, & it appeareth not to what vse the feoffment was made, ne it is not vpon any bargain or other recompence, then it shall be taken to be to the vse of the feoffee, except the contrary can be proued by some bargain, or other like, or that his intent at the time of the liuerie of seison was expessed that it should bee to the vse of the feoffee or of some other, and then it shall

The 21. Chapter.

shall go according to his intent, but in this case we thinke it shalbe take that his intent was that it should first be to the vse of the feoffee for the cause before rehearsed except the contrary can be proued, & so that knowledge of the intent of the feffor is the greatest certainty for knowledge of the vse in this case as me seemeth: but when the feffour goeth further and sayeth that if the rent be not payde that then the said J. B. should enter into the lande, then it appeareth that his intent was that the rent should cease, and that J. B. should enter into the lande, and though he may not by those wordes enter into the land after the rules of the law, and to haue freehold, yet these wordes seeme to bee sufficient to prouo: that the intent of the feffor was that hee should haue the vse of the land, for sith hee had the rent to his owne vse, and not to the vse of the feffor, so it seemeth hee shall haue the vse of the lande that is assigned to him for the payment of the rent. Do. But I am somewhat in doubt whether he had that rent to his owne vse: for the intent of the feffor might bee that hee should pay the rent for him to some other, or some other vse might bee appointed thereof by the feffor. Stu. If such an intent can be proued, then the intent must be obserued: but wee bee in the case to wit, to what vse it shall bee taken if the intent of the feffor cannot be proued, and then me thinketh it cannot bee otherwise taken, but that it shal bee to the vse of him to whom it should be paid: for though it be called a rent, yet it is no rent in the lawe, ne in the law he shall neuer haue remedy for it, though it were

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here assigned to him, and to his heires with-
out condition, neither by distresse, by assise, by
Writ of Annuity nor otherwise, but he shal be
dauen to sue in the Chaucerie for his reme-
dis, and then when hee sueth in the Chauncerie
hee must surmise that he ought to haue it by
conscience, and that he can haue no remedy for
it in the Law. And then, sith hee hath no reme-
dy to come to it but by the way of conscience, it
seemeth it shal be taken that when hee hath re-
coured it that he ought to haue it in conscience,
and that to his owne vse, without the contrary
can be proued, and if the contrary can be prou-
ed, and that the intent of the fessour was
that hee should dispose it for him as he should
appoint, then hath hee the rent in vse to an
other vse, and so one vse should bee depending
vpon an other vse, which is seldome seene, and
shall not be intended till it bee proued: and so,
sith no such matter is here expessed, me thinke-
th the rent shal be taken to be to the vse of him
that it is paied to, and the land in likewise that
it is appointed to him for not payment of the
said rent, shall bee also to his vse, how thinkest
thou will conscience serue therein? D. I thinke
that as thou takest the Lawe now, that conscie-
ence (in this case) and the Lawe bee all one, for
the lawe searcheth the same thing in this case,
to know the case that conscience doth, that is
to say, the intent of the fessour, and there-
fore I would moue thee further in one thing.

S. What is that?

D. That sith I intent of I fessour shal be so much
regarded in this case: why it ought not also

The 22. Chapter.

to be as much regarded in the case that is in the
last chapter next before this, where the wordes
be conditional, & giue the fessor a title to reuer-
ter, for me thinketh that though the fessor may
in that case reuerter for the condition broken,
that yet after this entrie he shall be seised of the
land after his entrie to the vse of him to whom
the lande was assigned by the said Indenture
for lacke of payment of the rent, because the in-
tent of the fessor shall be taken to be so in that
case as well as in this. And I pray thee let me
know thy minde what diuersitye thou puttest
betweene them. S. Thou driuest me now to a
narrow diuersitye, but yet I will answer thee
theretin as well as I can. D. But first ere thou
shew me that diuersitie: I pray thee shewe mee
how vses began, and why so much land hath
been put in vse in this Realme as hath bin. S.
I will with good will say as mee thinketh
therein.

How vses of land first began, and by what
law, and the cause why so much land
is put in Vse.

Cap. 22.

VSes were reserved by a secondary con-
clusion of the law of reason in this manner: wherby
the general custom of property, whereby
every man knew his own good fro his neigh-
bors was brought in among the people: It fol-
lowed of reason the such lands & goods as a man
had, ought not to be taken from him but by his
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assent or by order of a Lawe, & then sith it is so that every man that hath landes hath thereby 2. things in him, that is to say, the possession of the land which after the Lawe of England is called the franktenement or the freehold, & the other is authoritie to take thereby the profits of the land, wherefore it followeth that he that hath land & intendeth to give onely the possession & freehold thereof to an other & to keepe the profits to himself, ought in reason & conscience to haue the profits seeing there is no law made to prohibite, but that in conscience such reservation may be made. And so when a man maketh a feoffment to an other and intendeth that he himselfe shall take the profits, then the feoffee is said seised to his vse that so enfeoffed him, & is to say, to the vse that he shall haue the possession & freehold thereof as in the lawe to the intent that the feffor shall take the profits, and vnder this maner as I suppose viles of land first began D. It seemeth that the reseruing of such vse is prohibited by the law, but if a man make a feoffment and reserue the profits or any part of the profit, as the grasse, wood or such other, that reservation is void in the law: & mee thinketh it is all one to say, that the Law iudgeth such a thing if it be done to be void, & that the law prohibiteeth that & thing shall not be done. S. Truth it is that such reservation is void in the law as thou saist, and that is by reason of a Maxime in the Law that willeth & such reservation of part of the same thing shall be iudged void in the law, but yet the law doth not prohibite that no such reservation shall bee made,

R

but

The 22. Chapter.

but if it be made it iudgeth of what effect it shal
be, that is to say, that it shall be void, and so he
that maketh such reseruatiō offendeth no law
thereby, ne breaketh no law thereby, and ther-
fore the reseruatiō in conscience is good, but if
it were prohibite by statute that no man should
make such reseruatiō, ne y^e no feffmēt of trust
should be made, but y^e all the feffments should
bee to the vse of him to whom possession of the
land is giuen, then the reseruatiō of such vses
against the Statute should be void because it
were against the law, & yet such a Statut should
not be a statute against reason, because such v-
ses were first grounded and reserued by the law
of reason, but it should p^reuēnt the law of rea-
son, & should put away the consideration wher-
vpon the lawe of reason was grounded before
the Statut made. And then to the other questiō,
that is to say, why so much land hath bene put
in vse, it will be somewhat long & parauenture
to some tedious to shew all the causes particu-
larly, but the very cause why the vse remained
to y^e feffe norwithstanding his own feffment
or fine, & sometime notwithstanding a recoue-
ry against him, is al vpon one consideratiō af-
ter the cause and entent of the gift, fine or reco-
uery, as is aforesaid Do. Though reason may
serue that vpon a feffment a vse may be reser-
ued to the feoffor by the intent of the feoffor a-
gainst the forme of his gift as thou hast sayd
before, yet I marvel how much an vse may bee
reserued against a fine that is one of y^e highest
Recōuers that is in the law, and is taken in the
Law of so high effect that it should make an
end

end of all strifes, or against a recouerie that is
 ordeined in the law for them that bee wronged
 to recouer their right by, and me thinke that
 great inconuenience and hurt may follow whē
 such Recor'ds may so lightly bee auoided by a
 secret intent or vse of the parties & by a flude
 and bare auerrement & matter in deed, and spe-
 cially sith such a matter in deed may be alle-
 ged that is not true, wherby may rise great strife
 betwene the parties, & great confusion & un-
 certainty in the law: but neuerthelesse sith our
 intent is not at this time to treat of the mat-
 ter, I pray thee touch shortly some of the cau-
 ses, why there hath bin so many persons put in
 estate of lands to the vse of other, as there hath
 bin, for as I heare say few men bee sole seised
 of their owne land. **Sc.** There hath been many
 causes thereof, of the which some bee put away
 by diuers Statuts, & some remaine yet, wherfore
 thou shalt vnderstand that some haue put their
 land in feoffement secretly to the intent & they
 that haue right to the land should not knowe
 against whom to bring their action, and that is
 somewhat remedied by diuers Statutes that
 giue actions against Harnours and takers of
 the profits. And sometime such feoffements of
 trust haue bin made to haue maintenāce & bea-
 ring of their feoffees, which parauenture were
 great Lordes or rulers in the Countrey, and
 therefore to put away such maintenaunce, tre-
 ble damages be giuen by Statute against them
 that make such feoffements for maintenaunce.
 And sometime they were made to the vse of
 Mortmaine which might then bee made with-

¶ 4.

out

The 22. Chapter.

Out forsaithure though it were prohibited that
 Recehold might not be giue in Mortmain. But
 that is put away by the Statute of R. the 2. And
 sometime they were made to defraud the Lords
 of wards, reliefes, harriots, and of the lands of
 their viltetnes, but those pointes bee put away
 by diuers Statutes made in the time of king H.
 the 7. Sometime they were made to auoid exe-
 cutions vpon Statute Staple, Statute Mar-
 chant & Recognisance, and remedy is prouided
 for that, that a man shall haue execution of all
 such lands as any person is seised of to h^e vse of
 him that is so bounde at the time of execution
 sued in the 19. yere of H. 7. And yet remaine fe-
 offmentes, fines, and recoueries in vse of ma-
 ny other causes, in maner as many as there did
 before the sayde estatute. And one cause why
 they be yet thus bled is to put away tenauncie
 by the curtesie and tytes of Dower. In other
 cause is for that lands in vse that not be put in
 execution vpon a Statute Staple, Statute Mar-
 chant, nor Recognisance, but such as bee in the
 handes of the Recognisor at the time of the ex-
 ecution sued. And sometime lands be put in vse
 that they should not be put in execution vpon a
 writ of Extendi facias ad valentiam. And some-
 time such vses bee made that hee to whose vse
 et. may declare his wil thereon, & sometime for
 surety of diuers couenants in Indentures of
 marriage, & other bargaines, & these 2. last arti-
 cles be the chiefe & principal cause why so much
 land is put in vse. Also lāds in vse be not Affect
 neither in a Formedō, nor in an actiō of Dette
 against the heire: ne they shall not be put in ex-
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ecution by an Elegit sued vpon a recouerie as
 some men say, & these bee the very chiefe causes
 as I now remember why so much land stand-
 eth in vse as there doth, and all the sayd vses be
 reserued by the intent of the parties vnderstand
 or agreed between them, and that many times
 directly against the words of h̄ feoffment, sine
 or recouery, and that is done by the law of rea-
 son as is aforesaid. D. May not a vse bee assig-
 ned to a straunger as well as to bee reserued to
 the feoffour if the feoffour so appointed it vpon
 his feoffment? Stu. Yes as well, and in like-
 wise to the feoffee, and that vpon a free gift with-
 out any bargain or recompence if the feoffor so
 wil. D. What if no feoffment be made but that
 a man grant to his feoffee that from thenceforth
 he shal stand seised to his owne vse, is not that
 vse chaunged though there bee no recompence.
 Stu. I thinke yes, for there was an vse in esse
 before the gift which he may as lawfully giue
 away as he might the lād if he had it in posses-
 sion. D. And what if a man being seised of land
 in fee, grant to an other of his meere motiō w-
 out baraine or recompence h̄ hee from thences-
 forth shal bee seised to the vse of the other, is
 not that graunt good? Stu. I suppose that it is
 not good, for as I take the law: a man cannot
 commence an vse but by liuerie of seisin or vpon
 a bargaine or some other recompence. D. I
 hold me contented with that thou hast sayde in
 this Chapter for this time, & I pray thee shew
 me what diuersly thou puttess betweene those
 two cases that thou hast before rehearsed in
 the xx. Chapter and in the xxi. Chapter of this

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The 23. Chapter.

present booke, S. J. will with good will.

¶ The diuersity betweene two cases here after following, whereof one is put in the xx. Chapter, and the other in the xxi. Chapter of this present booke.

Cap. 23.

The first case of þe said two cases is this, A man maketh a feoffment by deed indented vpo a condition þe feoffee shal pay certeyne rent perely to a straunger ec. & if he pay it not, þe it shall be lawfull to the straunger to enter into the land. In this case I sayd befoze in the xx. Chapter that the straunger might not enter because that hee was not priuy vnto the condition. But I said that in that case the feoffor might lawfully reenter by the first wordes of the Indenture because they imply a condition in the Lawe, & that the other wordes (that is to say) that the straunger should enter, be void in law & conscience. And therefore I sayd farther that when the feoffor had reentered that he was seised of the land to his owne vse, and not to the vse of the straunger. though his intent at the making of the feoffment were that the straunger after his entrie should haue had the land to his own vse if he might haue entred by the Law. And the cause why I thinke that the feoffor was seised in that case to his owne vse I shall shew thee afterward. The second case is this, a man maketh a feoffment in fee, and it

is agreed vpon the feoffment, that the feoffee shall pay a perely rent to a stranger, & if he pay it not: that then the stranger shall enter into the lād. In this case I said as it appeareth in the said xxi. Chapter, that if the feoffee payed not the rent: that the stranger should haue the vse of the land though he may not by the rules of the law enter into the land, and the diuersitie betweene the cases me thinketh to bee this. In the first case it appeareth as I haue saide before in the said xi. Chapter, that the feoffour might lawfully reenter by the law for not payment of rent, & then when he entred according, hee by that entry auoided the first liuery of seysyn, insomuch that after the reentry hee was seyled of the land of like estate as hee was before the feoffment: And so remaineth nothing, whereupon the stranger might ground his vse, but onely the bare graunt or intent of the feoffor when he gaue the land to the feoffee vpon condition that hee should pay the rent to the stranger, and if not, that it should bee lawfull to the stranger to enter, for the feffment is auoyded by the reentry of the feffor as I haue sayde before, and as I sayd in the last Chapter, as I suppose a nude or bare graunt of him that is seised of land, is not sufficient to begin an vse vpo. D. A bare grant may change an vse as thou thy selfe agreed in the last chapter, why then may not an vse as well begin vpo a bare graunt? S. Whe an vse is in esse, hee that hath the vse may of his meere motion giue it away if hee will without recompence, as he might the land if hee had it in possession,

N. iiii.

but

The 23. Chapter.

but I take it for a ground that he cannot so begin an vse without a liuerie of seisin or upon a recompence or bargain, & that there is such a ground in the law & it may not so begin it appeareth thus: It hath bin alway holden for law, that if a man make a deed of feoffment to another & deliuer the deed to him as his deed, that in this case hee to whom the deed is deliuered hath no title ne meddling with the land afore liuerie of seisin be made to him, but only that hee may enter & occupie the lande at the will of the feoffor, & there is no booke saith that the feoffor in that case is seised thereof befoze liuerie to the vse of the feoffee. And in likewise if a man make a deed of feoffment of 2. acres of land that lie in 2. shires, intending to giue them to the feoffee & maketh liuerie of seisin in the one shire, & not in the other, in this case it is commonly holden in books that this deed is void to the acre where no liuerie is made, except it lie within the view, saue only that he may enter & occupie at will, as is aforesaid: & there is no booke that saith that the feoffee should haue the vse of the other acre, for if an vse passed thereby, then were not the deed void vnto al intents, & yet it appeareth by the wordes of the deed that the feoffor gaue the lands to the feoffee, but for lacke of liuerie of seisin & gift was void, & some thinketh it is here without liuerie of seisin be made according. But in this second case of this said 2. cases the feoffee may not reenter for non payment of the rent, and so the first liuerie of seisin continueth and standeth in effect, and thereupon the first vse may well begin and take effect in the stranger of the land when

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when the rent is not paid vnto him according to the first agreement. And so me thinketh that in the first case the vse is determined, because the liuery of seisin wherupon it commenced is determined, & that in the second case the vse of the land taketh effecte in the straunger for not payment of h rent by the grant made at the first liuery which yet continueth in his effect. & this mee thinketh is the diuersitie betwene the cases. Do. Yet notwithstanding the reason that thou hast made, me thinke that if a man seised of landes make a gift thereof by a nude promise without any liuery of seisin or recompence to him made, and graunt that he shall be seised to his vse, that though the promise be boide in the law, that yet neuerthelesse it must hold and stand good in conscience and by the law of reason, for one rule of the law of reason is, that we may do nothing against the truth, and sith the trouth is that the owner of the ground hath graunted that he shal be seised to the vse of the other, that grant must needs stand in effect, or else there is no truth in the graunto. Sec. It is not against the truth of the grauntor in this case though by the graunt hee bee not seised to the vse of the other, but it proueth that hee hath graunted, that the Law will not warrant him to graunt, wherefore his graunt is void. But if the graunto had gone farther and said that hee would also suffer the other to take the profits of the landes without let or other interruption, or that hee would make him estate in the land when hee should bee required, then I think in those cases he were boind in conscience
by

The 24. Chapter.

by that rule of the law of reason that thou hast remembred to performe them, if he intend to be bounden by his promise, for els he should go against his owne truth, and against his owne promise. But yet it shall make no vse in that case, nor he to whom the promise is made shall haue no action in the Law vpon that promise, though it be not performed, for it is called in the lawe a nude or naked promise; And thus me thinketh, that in the first case of the sayde two cases, the grant is now auoided in the law by the recntry of the scosso, and that the scosso is not bounden by his grant neither in law nor conscience, but in the second case he is bound, so that the vse passeth from him as I haue said before. D. I hold me content with thy conceit for this time, but I pray thee shew me somewhat moze at large what is taken for a Nude contract or a naked promise in the Lawes of England, and where an action may lye thereupon, and where not. S. I will with good will say as me thinketh therein.

¶ What is a Nude contract, or naked promise after the Lawes of England, and whether any action may lye thereupon.

Cap. 24.

First it is to be vnderstood that contracts be grounded vpon a custom of the realm, & by the law that is called Ius gentium, & not directly by the law of reason, for when all things were in common, it needed not to haue contracts,

tracts, but after property was brought in, they were right expedient to al people so that a man might haue of his neighboꝝ that he had not of his owne, and that could not bee lawfully but by his gift, by way of lending, concord, or by some lease, bargain, or sale, and such bargaines and sales bee called contracts, and be made by assent of the parties vpon agreement between them of goods or lands for money, or for other recompence, but of money vsuel, for money vsuell is no contract. Also a concord is properly vpon an agreement betweene the parties wih diuers articles there, some rising on the one part and some on the other; As if I at Shille leterib a Chamber to Henry Hart, and it is farther agreed betweene them that the said Henry H. shall goe to bord with the sayd John at Shille, and the said Henry Hart to pay for the Chamber and boording a certaine summe &c. this is properly called a Concord, but it is also a contract, & a good action lyeth vpon it. Howbeit it is not much argued in the Lawes of England what diuersity is betweene a contract, a concord, a promise, a gift, a lone, or a pledge, a bargain, a couenant, or such other. For the intent of the law is to haue the effect of the matter argued and not the termes. And a rude contract is where a man maketh a bargain, or a sale of his goods or landes without any recompence appointed for it: As if I say to an other, I sell thee all my land, or al my goodes, and nothing is assigned that the other shall giue or pay for it, this is a rude contract, and as I take it, it is hold in the law and conscience, and a rude
or

The 24. Chapter.

or naked promise is where a man promiseth an other to giue him certaine money such a day, or to build an house, or to do him such certain seruice, & nothing is assigned for the money, for building, nor for the seruice, these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to an other to keepe him such certaine goodes safely to such a time, & after I refuse to take them, there lyeth no action against him for it: But if I take the and after they bee lost or impaired through my negligent keeping, there an action lieth. D. But what opinion hold they that bee learned in the law of Englad in such promises that be called naked or nude promises, whether doe they hold that they that make the promise be bounden in conscience to perform their promise though they cannot be compelled thereto by the law or not? S. The books of the Law of England entreat little therof, for it is left to the determination of Doctors, & therfore I pray thee shew me somewhat now of thy minde therein, & then I shall shew thee therein somewhat of the minds of diuers that be learned in the law of the Realme. D. To declare that matter plainly after the saying of Doctors, it would aske a long time, and therfore I wil touch it briefly to giue thee occasion to desire to heare moze therein hereafter. First thou shalt vnderstand that there is a promise that is called an Oduow, & that is a promise made to God, & hee that doth make such a bow vpon a deliberate mind intending to per-

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for me it, is bound in conscience to do it though
 it be onely made in the heart without pronoun-
 cing of wordes, and of other promises made to
 man vpon a certain consideration if the promise
 be not against the law: As if A. promise to giue
 B. xx. li. because he hath made him such a house
 or hath lent him such a thing or such other like,
 I thinke him bound to keepe his promise. But
 if his promise be so naked that there is no ma-
 ner of consideration why it should be made, the
 I thinke him not bound to performe it, for it is
 to suppose that there was some Error in the
 making of the promise, but if such a promise be
 made to an Vniuersity, to a citie, to the church,
 to the Clergy, or to pooze men of such a place,
 or to the honoz. of God or such other cause like,
 as for maintenance of learning, of the common
 wealth, of the seruice of God, or in reliefe of
 pouertie or such other, then I thinke that he is
 bounden in conscience to performe it though there
 bee no consideration of worldly profit that the
 grauntoz hath had or intendeth to haue for it:
 and in all such promises it must be vnderstood
 that hee that made the promise intended to bee
 bounde by his promise, for else commonly after
 all Docto:rs hee is not bound, vntill hee were
 bound to it before his promise; As if a man pro-
 mise to giue his father a gowne that hath need
 of it, to keepe him from colde, and yet thinketh
 not to giue it him, neuertheless he is bound to
 giue it for he was bound thereto before. And
 after some Doctours a man may be excused of
 such a promise in conscience by casualltye that
 cometh after the promise if it be so that if hee
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The 24. Chapter.

had knowen of the casualtie at the making of the promise hee would not haue made it. And also such promises if they shal binde they must be honest,lawful,and possible,and els they are not to be holden in conscience though there be a cause &c. And if the promise be good & with a cause though no worldly profite shall grow thereby to him that maketh the promise, but onely a spirituall profit as in the case befoze rehearsed of a promise made to an Vniuersity, to a Cittie,to the Church, or such other, & with a cause as to the honour of God, there is most commonly holden that an action bpō those promises lyeth in the Lawe Cannon. S. Whether doest thou meane in such promises made to an Vniuersitie, to a Cittie, or to such other as thou hast rehearsed befoze, and with a cause, as to the honoz of God or such other: That the party shall be bound by his promise if he intended not to be bounded therby y^e or nay? D. I think nay, no moze then vpon promises made vnto common persons. Scu. And then mee thinketh cleerely that no action can lye against him bpō such promises, for it is secret in his owne conscience whether he intended for to bee bound or nay. And of the intent inward in h^e hart, mans law cannot iudge, and that is one of the causes why the Lawe of God is necessary (that is to say) to iudge inward thinges, and if an action should lye in h^e case in h^e law Cannon, the should the law Cannon iudge bpō h^e inward intent of the heart, which cannot be as me seemeth. And therefore after diuers h^e be learned in the lawes of the realme all promises shal be taken in this manner

maner, that is to say; If hee to whom the promise is made, haue a charge by reason of the promise which hath also performed: the in that case he shall haue an action for that thing that was promised though hee that made the promise haue no worldly profit by it. As if a man say to an other, heale such a pooze man of his disease, or make an high way, and I shall giue thee thus much, and if he do it, I thinke an action lyeth at the common law. And moreover though the thing that he shall do be all spirituall, yet if he performe it, I thinke an action lyeth at the common Law. As if a man say to an other, fast for me all the next Lent, and I shall giue thee xx. poundes, and hee performeth it, I thinke an action lyeth at the Common Lawe. And in likewise if a man say to an other, marry my daughter and I will giue thee xx. ponde, vpon this promise an action lyeth, if hee marry his daughter, and in this case hee cannot discharge the promise though hee thought not to be bound thereby, for it is a good contract, & he may haue Quid pro quo, that is to say, the preferment of his daughter for his money. But in those promises made to an Vniuersitie, or such other as thou hast remembred before, with such causes as thou hast shryded, that is to say, to the honour of God, or to the increase of learning, or such other like, where the party to whom the promise was made is bound to no newe charge, by reason of the promise made to him, but as hee was bound to before, there they thinke that no action lyeth against him though hee performe not his

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his promise, for it is no contract, & so his owne conscience must be his iudge whether he intended to bee bound by his promise or not. And if he intended it not: then he offended for his dissimulation only, but if he intended to be bound, then if he perform it not, vntruth is in him, and he proueth himselfe to be a lyer, which is prohibited aswel by the law of God as by the law of reason: And furthermore many have learned in the Law of England hold that a man is as much bounden in conscience by a promise made to a common person if he intended to be bound by his promise, as hee is in the other cases that thou hast remembred of a promise made to the Church, or the Clergie, or such other, for they say that asmuch vntruth is in the breaking of the one as of the other, & they say that the vntruth is more to bee pondred then the person to whom the promise is made. D. But what hold they if the promise be made for a thing past, as I promise thee xl. li. for that thou hast builded me such a house, leeth an action there? S. They suppose nay, but he shall be bound in conscience to perform it after his intent, as is before said. D. And if a man promise to giue an other xl. li. in recompence for such a trespassse that hee hath done him, leeth an action there? Sr. I suppose nay, & the cause is for that such promises be no perfect contractes: for a contract is properlie where a man for his money shall haue by assent of the other party certaine goods or some other profit at the time of the contract or after, but if the thing be promised for a cause that is past by way of a recompence, then it is rather an accord then a contract.

*Diff. inter
contract & accord*

contract, but then the Lawe is that vpon such accord the thing that is promised in recompence must be paid, or deliuered in hand, for vpon an accord there lyeth no action. D. But in the case of trespassse whether hold they that he be bound by his promise though hee intended not to be bound thereby. S. They think nay, no moze then in the other cases that be put before. D. In the other cases he was not bound to that he promised, but onely by his promise, but in this case of trespass, he was bound in conscience before the promise to make recompence for the trespassse, and thertoze it seemeth that he is bound in conscience to keep his promise though he intended not to be bound thereby.

St. Though hee were bound before the promise to make recompence for his trespass, yet he was not bound to no summe in certaine but by his promise, and because that the summe may be too much, or too little, and not egall to the trespass, and that the party to whom the trespass was done notwithstanding the promise is at liberty to take his action of Trespass if hee will, thertoze they hold that hee may be his owne Judge in conscience whether hee intended to be bound by his promise or not, as hee may in other cases, but if it were of a debt, then they hold that he is bound to perfozme his promise in conscience. Do. What if in the case of Trespass hee affirmeth his promise with an Oath. S. Then they holde that hee is bound to perfozme it for sauing of his oath though hee intended not to be bound, but if hee intended to be bound by his promise, then they say that

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an oath needeth not but to enforce þ promise, for they say hee breaketh the Lawe of reason, which is that we may doe nothing against the truth, aswell whē he breaketh his promise that he thought in his own hart to be bound by, as he doth when he breaketh his oath, though the offence bee not so great by reason of the perturie. Moreover to that thou sayest that vpon such promises as thou hast rehearsed befoze, shall lie an action after the law Cannon, verily as to that in this realme there can no action lie thereon in the spirituall court, if the promise be of a tempozal thing: for a prohibitio, or a Præmunire facias should lie in that case. D. That is maruaille ſith there can no action lie thereon in the Kings court, as thou saist thy self. S. That maketh no matter, for though there lye no action in the Kings court, against executors vpon a simple contract, yet if they bee sued in that case for the debt in the Spirituall court, a prohibition lyeth. And in likewise if a man wage his Lawe vntruly in an action of debt vpon a contract in the Kings Court, yet hee shall not be sued for the pertury in the Spirituall court, and yet no remedie lyeth for the pertury in the Kings Court, for the prohibition lyeth not onely where a man is sued in the Spirituall Court of such thinges, as the partie may haue his remedie in the Kings court, but also where the Spirituall court holdeth plee in such case, where they by the Kings prerogative, and by the auncient custome of the realme ought none so holde. Doct. I will take aduise ment vpon that thou hast sayd in this matter till an other time,

time, and I pray thee now proceed to an other question.

The xx. question of the Student.

Cap. 25.

A Man hath two sons, one borne before espousels, & the other after espousels, & the father by his Will bequeereth to his son & heire al his goods, which of these two sonnes shal haue the goods in conscience? D. As I said in our first dialogue in latin, the last Chap. the doubt of this case dependeth not in the knowing what conscience will in this case, but rather the knowing which of the sonnes shal be iudged heire (that is to say) whether he shal be taken for heire that is heire by the Spirituall Lawe, or hee that is heire by the Lawe of the Realme, or else that it shal be iudged for him that the father tooke for heire? Stu. As to that point, admit the fathers minde not to be known, or els that his minde was s^h he should be taken for heire, that should be iudged for heire by the Lawe, that in this case it ought to be iudged by. And then I pray thee shew me thy minde therein, for though the question bee not directly depending vpon the point to see what conscience will in this case, yet it is right expedient for the well ordyning of conscience that it be known after what law it shal be iudged, for if it ought to be iudged after the temporall law who would be heire, the it were against conscience, if the iudges in s^h spirituall law should

D. q.

Judge

The 25. Chapter.

Judge him for heire that is heire by the spirituall Law, and I thinke they should be bound to restitution thereby, and therefore I pray thee shewe me thine opinion, after what Lawe it shall be iudged. D. He thinketh that in this case it shall be iudged after the law of h church, for it appeareth that the bequest is of goodes, and therefore if any suit shall be taken vpon the execution of the will for the bequest, it must be taken in the Spirituall Court, and when it is depending in the spirituall Court, mee thinketh it must be iudged after the spirituall law, for of the Tempozall law they haue no knowledge, nor they are not bound to know it as me thinketh, and more stronger not to Judge after it. But if the bequest had bin of a chattell real, as of a lease for terme of yeares, or of a ward, or such other, then the matter should haue come in debate in the Kinges Court, and then I thinke the Judges there should iudge after the Law of the Realme, and that is, that the ponger brother is heire: and so me thinketh the diuersity of the Courtes shall make the diuersitie of iudgement. St. Of that might follow a great inconuenience as me semeth, for it might be such a case that both chattels real, and chattels personal were in the wil, & then after thine opinion, the one sonne should haue the chattels personal, and the other sonne the chattels real, & it cannot be conveniently taken as mee thinketh, but that the fathers will was that the one sonne should haue all, and not be deuided. Therefore me thinketh that he shall be iudged for heire that is heire by the common lawe.

And

And that the Iudges spirituall in this case bee bound to take notice what the common law is, for: sith the thinges that be in variance be temporall, that is to say, the goods of the father, it is reason that the right of them in this realme shall be determined by the law of the Realme. D. How may that be? for the Iudges spirituall know not the law of the Realme, ne they cannot know it as to the most part of it, for much part of the law is in such speech that fewe men haue knowledge of it, and there is no means ne familiarity of study between them that learne the sayd Lawes, for they be learned in several places & after diuers waies, and after diuers maners of teachinges, and in diuers speeches, and commonly the one of them haue none of þe bookes of the other, and to binde the spirituall Iudges to giue Iudgment after the law that they know not, ne that they cannot come to the knowledge of it, seemeth not reasonable. Stu. They must doe therein as the Kings Iudges must doe when any matter cometh before the that ought to bee Iudged after the spirituall Law, whereof I put diuers cases in our first Dialogue in English the vii. Chapter, that is to say, they must either take knowledge of it by their own study or els they must enquire of the that be learned in the law of the Church, what the law is, and in likewise must they doe. But it is to doubt that some of them would be loath to aske any such question in such case or to confesse that they are bound to giue their Iudgment after the temporall Lawe, and surely they may lightly offend their conscience.

D. Iq.

D. J

The 25. Chapter. 4

D. I suppose that some be of opinion that they are not bound to know the lawe of the realme, & verily to my remembrance I haue not heard that Iudges of the spiritual law are bound to know the law of the realme.

Stu. And I suppose that they are not onely bound to know the Law of the Realme, or to do that in them is to know it, when the knowledge of it openeth the right of the matter that dependeth before them, but that they bee also bounde to know where and in what case they ought to Iudge after it, for in such cases they must take the Kings law as the Law spiritual to that point, and are bound in conscience to follow it as it may appeare by diuers cases, whereof one is this. Two Iointenants be of goods, and the one of them by his last will bequeatheth all his part to a straunger and maketh the other Iointenant his executor and dieth, if he to whom the bequest is made, sue the other iointenant, vpon the legacy as executour &c. vpon this matter shewed the Iudges of the Spirituall Law are bound to Iudge the will to be boide, because it is boide by the Law of the realme, whereby the iointenant hath right to the whole goodes by the title of the Survivor, and is Iudged to haue the goods as by the first gift which is before the title of the Will, and must therefore haue preferment as the eldest title, and if the Iudges of the Spiritual Court iudge otherwise, they are bound to restitution, and by like reason the Executors of a man that is Outlawed at the time of his death may discharge themselves in the
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Spiritual court of the performing of legacies because they be chargeable to the king, and yet there is no such law of vilagary in the Spirituall law.

D. By occasion of that thou hast sayd before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall law hath ordeined, is not that alienation sufficient though it haue not the solemnities of the Tempozall Law? Sr. I am in doubt therein if the portion be vnder the fourth part of the value of the Church, but if it be to the value of the fourth part of the Church or above, it is not sufficient, and therefore was the writ of right of Dismes ordeined, and if in a writ of right of Dismes it bee iudged in the kings court for the patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Judges of the Spirituall law are bound to giue their iudgment according to the iudgement giuen in the kings Court. And in likewise if a parson of a Church agree to take a pension for the tythe of a Mill, if the pension bee to the fourth part of the value of the Church or above, then it must be aliened after the solemnities of the Kings Lawes, as lands and tenementes must, or else the patron of the successor of him that alieneth may bring a writ of right of Dismes and recouer in the Kings court, then the Judges of the spiritual court are bound to giue iudgement in the Spiritual Courtes accordingly, as is aforesayd. Do. I haue heard say that a writ of right of dimes is

¶ uq.

giuen

The 25. Chapter.

Given by the Statute of West. 2. and that speaketh only of dismes & not of pension. S. Where a Parson of a Church is wrongfully deforced of his dismes and is let by an Indicaunt to aske his Dismes in the Spiritual Court, then this patron may haue a Writ of Right of Dismes by the Statute that thou speakest of, for there laye none at the common Lawe, for the Parson had there good right though he were let by the Indicaunt to sue for his right. But whē the Parson had no remedy at the Spirituall law, there a Writ of Right of Dismes lay for the Patron by the common law, as wel of pensions as of Dismes, and some say that in such case it lay of lesse then of the fourth part by the common law, but that I passe ouer. And the reason why it lay at the common Lawe if the Dismes or pensions were aboue the fourth part &c. was this: by the spirituell law the alienation of the parson with the assent of the Bishop and of the Chapter shall barre the successour without assent of the patron, and so the patron might leese his patronage and he not assenting thereto: for his encumbent might haue no remedy but in the Spirituall court, and there hee was barred, wherefore the patron in that case shal haue his remedy by the cōmon law where the assent of the Ordinary and Chapter without the Patron shall not serue as it is sayd before. But where the encumbent had good right by the Spirituall Lawe, there lay no remedy for the Patron by the common law though the incumbent were let by an Indicaunt, and for that cause was the said Statute made, and it lyeth

lyeth aswel by the equity for offerings and pen-
 sions, as for Dimes. Then further I would
 thinke that where the Spirituall Court may
 hold ptee of a tempozall thing, that they must
 Judge after the tempozall Law, and that ig-
 nozaunce shall not excuse them in that case, for
 by taking of their office they haue bound them-
 selues to haue knowledge of asmuch as belons-
 geth to their office, as al Judges be spiritual,
 or tempozall. But if it were in Argument in
 this case, whether the eldest sonne might bee a
 Priest because he is a bastard in the tempozall
 Law, that should be iudged after the spirituall
 Law, for the matter is spirituall. Do. Yet not-
 withstanding all the reasons that thou hast
 made, I cannot see how the Judges of the spi-
 rituall Law, shall be compelled to take notice
 of the tempozal Law, seeing that the most part
 of it is in the French tongue, for it were hard
 that euery Spirituall Judge should bee com-
 pelled to learne the tongue. But if the lawe of
 the Realme were set in such order that they
 that intend to study the Lawe Cannon, might
 first haue a sight of the lawe of the Realme, as
 they haue nowe of the Lawe Ciuill, and that
 some bookes and treatises were made of cases
 of conscience concerning these two Lawes, as
 there be now concerning the lawe Ciuill & the
 lawe Canon, I would assent that it were right
 expedient, and then reason might serue the bet-
 ter that they should bee compelled to take no-
 tice of the Lawe of the Realme, as they be now
 bound in such Countries as the lawe Ciuill is
 vsed to take notice of that Law.

St.

The 26. Chapter.

S. **W**hee thinketh thine opinion is right good and reasonable, but till such an order be taken they are bound as I suppose to inquire of the that be learned in the common Law what the Law is, and so to giue their iudgement according, if they will keepe themselves from offence of conscience. And forasmuch as thou hast wel satisfied my mind in all these questions befoze, I pray thee now that I may somewhat feele thy mind in diuers articles that bee written in diuers bookes for the ordyng of conscience vpon the Lawe Cannon and Ciuill, for me thinketh that there be diuers conclusions put in diuers bookes, as in the *Summes* called *Summa Angelica*, and *Summa Rosella*, & diuers other, for the good order of conscience that be against the law of this Realme, and rather blind conscience then do giue any light vnto it.

D. I pray thee shew me some of those cases. Scu. I will with good will.

¶ Whether an Abbot may with conscience present to an Aduowson of a church that belongeth to the house without assent of the Couent.

Cap. 26.

It appeareth in the Chapter, Et agnoscitur de his que sunt a prelati, the which Chapter is recited in the sum called *Summa Angelica*, in the title *Abbas*, the xxvii. article, that he may not without any custome or any special priuile

priviledge to help therein. **St.** Truth it is, that there is such a decretall, but they that bee learned in the Law of England, hold the decretall bindeth not in this Realme, & this is the cause why they doe hold that opinion: By the Lawe of the realm the whole disposition of the lands and goods of the Abbey is to Abbots onely for the tyme that hee is Abbot, and not in the Couent, for they bee but as dead persons in the Law, and therefore the Abbot shall sue and be sued onely without the Couent, doe homage, fealty, attorne, make leases, and present to aduowsons onely in his owne name, and they say further that this authoritie cannot be taken from him but by the Lawe of the Realme, and so they say, that the makers of the decretall exceeded their power: wherefore they say it is not to bee holden in conscience, no more then if a decree were made that a lease for terme of yeeres or at will made by the Abbot without the couent should be immediately void, & so they thinke that the Abbot may in this case present in his own name without offence of conscience, because the said decretall holdeth not in this Realme. **Do.** But many bee of opinion that no man hath authoritie to present in right and conscience to any benefice with Cure but the Pope, or that hee hath his authoritie therein deriued from the Pope, for they say that so farre much as the Pope is the Vicar generall vnder God, and hath the charge of the soules of all people that be in the flock of Christs Church, it is reason that with hee cannot minister to all, he doe that is necessary to all people for their soules

The 26. Chapter.

soules health in his owne person, that hee shall
 assigne deputies for his discharge in that be-
 halfe. And because Patrons claime to present
 to Churches in this Realme by their owne
 right without title deriued from the Pope,
 they say that they vsurpe vpon the Popes au-
 thoritie, & therefore they conclude that though
 the Abbot haue title by the lawe of the Realme
 to present in this case in his owne name, that
 yet because that title is against the Popes
 prerogatiue, that that title, ne yet the Lawe of
 the Realme that maintaineth that title, hol-
 deth not in conscience. And they say also that
 it belongeth to the lawe Cannon to determine
 the right presentment of Benefices, for it is a
 thing spirituall and belongeth to the spirituall
 iurisdiction, as the deprivation from a benefice
 doth, and so they say the said decretall bindeth
 in conscience though in the lawe of the Realme
 it bindeth not. S. As to the first consideration
 I would right well agree, that if the patrons
 of Churches in this Realme claymed to put
 incumbents into such Churches as should fall
 voide of their Patronage without presenting
 them to the Bishop, or if they claymed that the
 Bishop should admit such incumbent as they
 should present without any examination to bee
 made of his ability in that behalfe, that that
 claime were against reason and conscience, for
 the cause that thou hast rehearsed: But for as-
 much as the Patrons in this Realme claime
 no more but to present they Incumbentes to
 the Bishop, and then the Bishop to examine
 the ability of the incumbent, and if he find him
 be

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by the Examination not able to haue cure of
soules, he then to refuse him, and the patron to
present an other that shalbe able, and if he be a-
ble then the Bishoppe to admit him, institute
him, & induct him, I thinke that this claime, &
their presentments thereupon stand with good
reason and conscience. And as to the second
consideration it is holden in the Lawes of the
Realme that the right of presentment to a
Church, is a tempozall inheritance, & shall dis-
cend by course of inheritance from heire to heire
as lands & tenements shal, & shalbe takē as an
asset as landes and tenements be, and for the
tryal of the right of patronages be ordeined in
the law diuers actions for thē that bee wronged
in that behalfe, as writs of right of Aduow-
son, Assises of Darrein presentment, Quare im-
pedi, & diuers other which alwaye about time
of mind haue bin pleaded in the Kings courts,
as things pertaining to his Crowne and roy-
all dignite, and therefore they say that in this
case his lawes ought to be obeyed in law and
conscience. D. If it come in variance whether
hee that is so presented bee able or not able, by
whom shall the ability be tryed? S. If the ordi-
nary bee not party to the action, it shall bee tryed
by the Ordinary, and if he be partie it shall
bee tryed by the Metropolitane. Do. Then the
Law is moze reasonable in that point then I
thought it had been, but in the other point I
will take aduise in it til an other time, and
I pray thee shewe mee thy minde in this point;
If an Abbot name his couent with him in his
presentation, doth that make the presentation
void

' The 26. Chapter.'

holde in the Lawe, or is the presentation good that notwithstanding?

S. I thinke it is not void therfore, but the naming of them is void and a thing moze then needeth. For if the Abbot be disturbed he must bring his action in his owne name without the couent. D. Then I perceiue well that it is not prohibited by the Lawe of England, but that the Abbot may name the couent in his presentation with him, and also take theyr assent whom hee shall present if he will, and then I holde it the surest way, that hee so doe, for in so doing he shall not offend neyther in Law, nor conscience. S. To take the assent of the Couent whom he shall present, and to name them also in the presentation knowing that hee may doe otherwise, both in Law and Conscience if hee will, is no offence, but if he take their assent, or name the with him in the presentation, thinking that he is so bound to doe in law & conscience, setting a conscience where none is, & regardeth not the Law of the Realme, that will discharge his conscience in this behalfe, if hee will so that hee present an able man as he may do without their assent, there is an error, and offence of conscience in the Abbot. And in likewise if the Abbot present in his owne name, and therefore the Couent saith that hee offendeth in conscience, in that he obserueth not the law of the Church, for that he taketh not their assent, then they offend in iudging him to offend that offendeth not. And therefore the sure way is in this case to iudge both the said lawes of such effect as they bee, & not to let an offence of

of conscience by breaking of the same decree,
which standeth not in effect in this behalf to
this Realme.

- ¶ If a man find beasts in his ground doing hurt
whether may hee by his owne authority,
take them & keep them till he be
satisfied for the hurt.

Cap. 27.

This question is made in the Sum called
Summa Rosella, in the title of restitution,
that is to say, Restitutio 13. the 9. arti-
cle, & there it is answered that he may not take
them for to hold them as a pledge till hee be sa-
tisfied for the hurt: but that hee may take them
and keepe them till he know who oweth them,
that he may thereby learne against whom to
haue his remedy. Is not the law of the realme
so in likewise? S. No verily, for by the Lawe of
the Realme, hee that in that case hath the hurt,
may take the beastes as a Distres, & put them
in a pound Quert, so it be within the same
Shire, and there let them remain till the owner
will make him amends for the hurt. D. What
callest thou a pound Quert. Stu. A pound Q-
uert is not onely such a pound as is common-
ly made in Townes and Lordships, for to put
in beastes that bee distrained, but it is also eu-
ery place where they may bee in lawfully, not
making the owner an offendour for they bee-
ing there; And that it be there also, that the
owner

¶ The 27. Chapter.

owner may lawfully geue the beastes meat and drinke while they be in pound.

D. And if they die in pound for lack of meat whose leopardy is it? S. If it bee such a pound Quert as I speake of, it is at the perill of him that oweth the beastes, so that hee that had the hurt shalbe at liberty to take his action for the trespassse if hee will, and if it bee not a lawfull pound, then it is at the perill of him that distrained, and so it is if he drue them out of the shire and they dye there.

D. I put case that he that oweth the beastes, offer sufficient amends, and the other will not take it, but keepeth the beastes still in pounds, may not the owner take them out? St. No, for he may not be his owne iudge. And if hee doe, an action lyeth against him for breaking of the pound, but he must sue a Replewin to haue his beastes deliuered him out of the pound, and therupon it shalbe tried by xii. men whether the amendes that was offered were sufficient or not, and if it bee found that the offer was not sufficient, then he that hath the hurt shall haue such amendes as the xii. men shall assesse. D. If it bee found by the xii. men that the amendes were sufficient, shall he that refuseth to take it, haue no punishment for his refusell, and for keeping of the beastes in pound after that time? S. I thinke no, but that he shall recd damages in the Replewin, because the issue is tryed against him.

D. I put case that the beastes after the refusal dye in pound for lack of meat, at whose leopardy is it then? St. At the leopardy of him that owed

owed the beastes, as it was befoze, for he is bound at his perill by reason of the wrong that was done at the beginning, to see that they haue meat as long as they shalbe in pound, vnalesse the Kings writ come to deliuer them, & he resisseth it, for after that time it will bee at his treopardy if they die for lacke of meate, & the damages shall be recovered in an action brought vpon the Statute for disobeying the kinges writ.

¶ Whether a gift made by one vnder the age of xxv. yeares be good.

Cap. 28.

IT appeareth in Summa Angelica in the title donatia prima the 7. article, that a man befoze the age of 25. yeres may not giue, without it be with the authoritie of his tutor. Is it not so likewise at the common Lawe? S. The age of infants to giue, or sel their lands and goods in the law of England is at 21. yere, or aboue, so that after that age the gift is good, & befoze that age it is not good, by whose assent soeuer it be except it be for his meat, & his drink, or apparel, or that hee doe it as executor, in performance of the will of his testator, or in some other like cases that needeth not to be rehearsed here, & that age must be obserued in this realm in law & conscience, and not the said age of 25. yere. D. I put case it were ordeined by a decree of the Church, that if any man by his will bequeathed goods to an other, & willeth they

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The 28. Chapter.

shalbe deliuered to him at his full age, & that in that case 25. yerres shalbe taken for the full age, shal not that decree bee obserued & stand good after the law of England: S. I suppose it shal not, for though it belong to the church to haue the probate and the execution of Testaments made of goods & chattels, except it be in certain Lordships & seignories that haue the by prescription, yet the church may not as it seemeth determine what shalbe the lawfull age for any person to haue the goods, for that belongeth to the king & his lawes to determine, & therfore if it were ordeined by a statute of the realme, that he should not in such a case haue the goods till he were of the age of 25. yerres, that statute were good & to be obserued aswel in the spiritual law as in the law of the Realme, & if a statute were good in that case, then a decree made therof is not to be obserued, for the ordyning of the age may not be vnder two several powers, and one propriety of euery good law of man is, that the manner exceed not his authority, and I think that the spirituall iudge in that case ought to iudge the full age after the law of the Realme, seeing that the matter of the age concerneth temporall goods, and I suppose farther that as the king by authority of his Parliament may ordaine that all wils shalbe void, & that the goods of euery man shall be disposed in such maner as by statute should be assigned, that moze stronger he may appoint at what age such wils as bee made shalbe performed. D. Thinkest thou that the king may take away the power of the Ordinary, that he shal not call executors to account,

compe^t Se. I am somewhat in doubt therein, but it seemeth that if it might be enacted by Statute, that all wils should bee void, as is aforesaid, that the it might be enacted that no man should haue authoritie to call none to accompt vpon such wils, but such as the Statute shall therein appoint, for he that may do the more, may doe lesse, notwithstanding I will nothing speake determinately in that point at this time, ne I meane not that it were good to make a Statute that all wils should be void, for I thinke them right expedient, but mine intent is, to proue that the common law may ordaine the time of the full age, aswell in wils of tempozal things as otherwise, and also that wils shal be made. And if it may so doe, then much stronger it belongeth to the Kings lawes to interpret wils concerning tempozal things, aswell when they come in argument before his Judges, as when they come in argument before spirituall Judges, and that they ought not to be iudged by seuerall lawes (that is to say) by the Spirituall iudges in one maner, & by the Kings Judges in an other maner.

¶ If a man be conuict of heresie before the Ordinary, whether his goods be forfeited.

Cap. 29.

I Tappereth in Suma Angelica in the title donatio prima the 13. article, that hee that is an heretike may not make Executors, for in the law

¶ 11.

The 29. Chapter.

law his goods be forfeit, what is the law of the realm therein? S. If a man be convicted of heresie and abjure, he hath forfeit no goods, but if hee be convicted of heresie, & be deliuered to lay mens hands, then hath he forfeit all his goods that he hath at that time that he is deliuered to them, though he be not put in execution for the heresie, but his lands he shall not forfeit except hee be dead for the heresie, & then he shall forfeit the to the lords of the fee, as in case of felony, except they be holden of the Ordinarie, for then the King shall haue the forfeiture, as it appeareth by a statute made the second yeare of H. 5. Cap. 7. D. Wee thinke that as it belongeth onely to the Church to determine heresie, that so it belongeth to the Church, to determine what punishment hee shall haue for his heresie, except death, which they may not bee iudges in, but if the Church decree that he shall therefore forfeit his goods, we thinke that they bee forfeit by that decree? S. Nay verily, for they be temporal, and belong to the iudgement of the Kings Court, and I thinke the Ordinarie might haue set no fine vpon one impeached of heresie, till it was ordeined by the Statute of H. 4. that hee may set a fine in that case if he see cause, & then the King shall haue that fine, as in the said statute appeareth.

¶ Where diuers patrons of an Aduowson, and the Church voideth, the patrons vary in their presentments, whether the Bishop shall haue liberty to present which of the incumbents that he will, or not.

Cap.

Cap. 30.

This questiō is asked in Súma Rosella, in the title Patronus the 9. article, & there it appeareth by the better opinion & he may present whether clark he wil, howbeit & maker of the said sum, saith by the rigoz of the law the Bishop in such case may present a stranger because the patrons agree not, & in the same chap. Patronus the 10. article; It is said, & he must be preferred that hath the most meritis & hath the most part of the patrons: And if the number be egal, that then it is to consider the meritis of the patron, & if they be of like merite, then may the Bishop command them to agree and to present again. And if they cannot yet agree, then the liberty to present is given to the Bishop to take which hee wil, & if he may not yet present without great trouble, then shall the Bishop order the Church in the best maner he can, & if he cannot order it, then shal he suspend the church & take away the relics to the rebukes of the patrons and if they will not so be ordered they must seeke the help of the tēporalite: And in the 15. article of the said title Patronus; It is asked whether it be expedient in such case that the more part of the patrons agree having respect to all the patrons, or & it suffice to have the more part in comparison of the lesse part, as thus; There be foure patrons to present one clark: the third presenteth an other, and the fourth an other, he that is presented by 3. hath not the more part in comparison of all patrons, for they be egal, but hee hath the more part having respect to

¶ iii.

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The 30. Chapter.

the other presentmentes, to this question it is answered that either the presentment is made of them & be of the colledge, & there is requisite the moze part hauing respect to al the colledge, or els euery mā presenteth for himselfe as commonly do lay mē & haue the patronage of their patrimony, & then it sufficerh to haue the moze part in respect of the other partes, doth not the law of England agree to these diuersities: Sr. No verily. D. What order shalbe taken in the law of England if & patrons bary in their presentments? S. After the lawes of England this order shalbe taken; If they be iointenāts, or tenants in cōmon of & patronage, & they bary in presentment, the Ordinary is not bound to admit none of their clerks, neither the moze part nor the lesse, and if the vi. moneths passe or they agree, then he may present by the laps, but he may not present wthin the 6. moneths, for if he do, they may agree & bring a quare imp agānst him, & remoue his clerke, & so the ordinary shal be a disturber, and if the patrons haue the patronage by discent as coparceners, then is the Ordinary bound to admit the clerk of the eldest sister, for the eldest shal haue the preferment in the law, if she will, & then at the next auoidance the next sister shall present, and so by turne one sister after an other, till all the sisters or theyeirs haue presented, & thē the eldest sister shall begin again, and this is called a presenting by turne, & it holdeth alway between coparceners of an aduowson, except they agree to present together or that they agree by cōposition to present in some other maner, and if they doe so, the agrees

agreement must stand, but this must be alway except, that if at the first avoidance that shall be after the death of the common ancestor, ¶ King haue the ward of the yongest daughter, ¶ then the King by his prerogative shall haue the presentment. And at the next avoidance the eldest sister and so by turne. But it is to vnderstand ¶ if after the death of the common ancestor the church holdeth, and the eldest sister presented together with an other of ¶ sisters, & the other sisters euery one in their owne name or together, that in ¶ case the Ordinary is not bound to receiue none of their Clerkes but may suffer the church to run into the laps, as it is said before, for he shall not be bound to receiue ¶ clerk of the eldest sister, but where she presenteth in her owne name. And in this case where the patrons vary in presentment, the Church is not properly said Litigious, so that the Ordinary should be bound at his perill to direct a writ to inquire de iure patronatus: for that writ lyeth where 2. present by several titles, but these patrons present al in one title, & therfore the Ordinary may suffer it to passe if hee will into the laps, and this maner of presentments must be obserued in this realme in law and conscience.

¶ How long time the patron shall haue to present to a benefice.

Cap. 31.

This question is asked in Súma Angelica in the title Ius patronatus the 16 article, & there it is answered, ¶ if the patr o be a lay man that he shall haue 4. monthes, & if he bee a

¶ iii.

Clarke,

The 3 I. Chapter.

Clarke, he shal haue vi. moneths. S. And by the common law he shal haue vi. moneths whether he be a lay man or a Clarke, and I see no reason why a Clarke should haue moze respit then a lay man, but rather the contrary. Do. From what time shal þ vi. moneths be accounted? S. That is in diuers maners after the maner of the voidance, for if the church void by death, creation, or cession, the vi. moneths shal be counted from the death of the encumbent, or from the creation, or cession, whereof the patron shall bee compelled to take notice at his peril, and if the voidance be by resignation or deprivation, the vi. moneths shall begin when the patron hath knowledge giuen him by the Bishop of the resignation or deprivation. Do. What if he haue knowledge of the resignation or deprivation and not by the Bishop, but by some other, shall not the sixe moneths begin then from the time of that knowledge? St. I suppose that it shal not begin til he haue knowledge giuen him by the Bishop. D. In vniou is also a cause of voidance, how shall the vi. moneths bee reckoned there? S. There can no vniou bee made but the patrons must haue knowledge, and it must bee appointed who shall present after that vniou, þ is to say, one of them or both, cyther ioyntly or by turne one after another as the agreement is vpon the vniou, and sith the patron is priuy to the auoidance, and is not ignorant of it, the vi. moneths shall bee accounted from the agreement. Do. I see well by the reason that thou hast made in this Chapter, þ ignorance sometime excuseth in the Lawe of Englande, for in some

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some of the sayd annoydaunces it shall excuse the patrons, as it appeareth by the reasons aboue, and in some it shall not, wherefoze I pray thee shew me somewhat where ignoraunce excuseth in the Lawe of England, and where not after thine opinion. S. I will with good will hereafter doe as thou sayest if thou put mee in remembrance thereof. But I would yet mouue thee somewhat further in such questions as I haue moued thee befoze concerning the diuersities betwene the laws of England and other lawes: for there be many moe cases therof that as mee seemeth haue right great neede for the good order of conscience of many persons to be reformed and to bee brought into one opinion both among spirituall and tempozal, as it is in the case where Doctors holde opinion that the statute of lay men that restraine liberty to giue lands to the Church should be void, & they say farther that if it were prohibite by a statute that no gift should be made to forreines, that yet a gift made to the church should be good, for they say, that the inferiour may not take away the authoritie of the superiour, & this saying is directly against the statutes wherby it is prohibite that lands should not be giuen into Mortmain, and they say also that bequests and gifts to the church must be determined after the law Canon, & not after the laws & statutes of lay men, and so they regard much to whom the gift is made, whether to the Church or to make causewaies, or to comon persons, & beare moze fauor in giftes to the Church then to other, and the lawe of the Realme beholdeth the thing that is
 given

The 32. Chapter.

giuen and pretended, that if the thing that is
giue be of lauds or goods, that the determina-
tion thereof of right belongeth in this Realme
to the Kings Lawes, whether it be to spiritual
men or temporal to the church, or to other, and
so is great diuision in this behalf whē one pre-
ferreth his opinion, & an other his, & one this
iurisdiction, & an other that, and that as it is to
feare more of singularity then of charity: where-
fore it seemeth that they that haue the greatest
charge ouer the people specially to the health of
their soules, are most bound in conscience before
other to look to this matter, & to do that in this
is in all charity to haue it reformed, not behol-
ding the temporal iurisdiction nor spiritual iur-
isdiction, but the common wealth & quietnes
of the people: & that undoubtedly would shortly
follow if this diuision were put away, which I
suppose verily wil not be but that al men with-
in the realme both spiritual & temporal be or-
dered & ruled by one law as to temporal thinges:
Notwithstanding forasmuch as the purpose of
this writing is not to treat of this matter,
therefore I wil no farther speak thereof at this
time. D. Then I pray thee proceed to an other
question as thou seest thy mind is to doe. S. I
will with good will.

¶ If a man be excommenged, whether he may
in any case be absolved without making
satisfaction.

Cap. 32.

Iⁿ the summe called Summa Rosella, in the
title Absolutio quarta, the second article, it is
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said, that he that is excommunicate for a wrong if he bee able to make satisfaction, ought not to be assolied but he doe satisfie, & that they offend that do assolie him, but yet neuertheles he is assolied, & if he be not able to make amends that he must yet be assolied, taking a sufficient gage to satisfie if he be able hereafter, or els that hee make an other to satisfie if he be able. And these sayings in many things hold not in the lawes of England. D. I pray thee shew me wherein the law of the Realme varieth there from. S. If a man be excommunicate in the spirituall court for debt, trespass, or such other things as belong to the Kings crowne, and to his roial dignity, there hee ought to be assolied without making any satisfaction, for the spirituall Court exceedeth their power in that they held pice in those cases, & the party if he will may therupon have a Præmunire facias, as wel against the partie that sued him, as against the Judge, & therefore in this case they ought in conscience to make absolution without any satisfactio, for they not onely offended the party in calling him to answer before them of such things as belong to the law of the Realme, but also the King: for he by reason of such suits may lesse great advantages by reason of the writs originals, subdials, fines, amerciements, & such other things as might grow to him if suits had bin taken in his courts according to his lawes, & according to this saying it appeareth in diuers Statutes, that if a man lay violent hands vpon a Clerk and beat him, that for the beating amends shall be made in the Kings court, and for the laying

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The 32. Chapter.

of violent hands vpon the Clark, amends shal be made in the Court christian. And therfore if the Judge in the court christian would award the party to peld damages for the beating, hee did against the Statute: but admit that a man be excommunged for a thing that the spirituall Court may award the party to make satisfaction of, as for the not inclosing of the Churchyard, or for not apparelling of the church conveniently; Then I think the party must make restitution or lay a sufficient caucion if he be able or he be assoiled: but if the party offer sufficient amends and haue his absolution, and the Judge will not make him his letters of absolution, if the excommungement bee of Record in the Kings Court, then the King may write vnto the spirituall Judge, commaunding him that hee make the partie his letters of absolution vpon paine of a contempt, & if the sayd excommunication be not of Record in the Kings Court, then the party may in such case haue his actiō against the Judge spiritual, for that hee would not make him his letters of absolution, but if he be not assoiled, or if he be not able to make satisfaction, and therfore the Judge spirituall wil not assoile him, what the Kinges Lawes may do in this case I am somewhat in doubt & wil not much speake of it at this time, but as I suppose he may aswel haue his actiō in that case for the not assoiling him, as where he is assoiled, and that h^e Judge wil not make him his letters of absolution: and I suppose the same law to be where a man is accursed for a thing that h^e Judge had no power to accurse him

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him in, as for Debt, Trespasse, or such other. Do. There he may haue other remedies, as a Præmunire facias, or such other, and therefore I suppose the other action lieth not for him.

S. The Judge and the partie may be dead, & then no Præmunire lieth, and though they were a līue and were condemned in Præmunire, yet that should not auoid the excommungement, & therefore I thinke the action lyeth specially, if he be thereby delayed of actions that hee might haue in the kings court, if ſaid excommungement had not bin.

¶ Whether a Prelate may refuse a Legacie.

Cap. 33.

IT is mooued in the said sum, named Rosella in the title Alienatio xx. the xi. article, whether a pzelate may refuse a legacy, wherein diuers opinions be rected ther, which as me thinketh haue need after the lawes of the realm to be more plainly declared. D. I pray thee shew me what the Law of the Realme will therein. S. I thinke that euery pzelate and soueraigne that may onely sue, and be sued in his owne name, as Abbottes, Bishops, and such other, may refuse any legacy that is made to the house: for the legacy is not perfit till hee to whom it is made assent to take it, for els if hee might not refuse it, he might be compelled to haue landes wherby he might in some case haue great losse, but

The 33. Chapter.

but then if he intend to refuse, he must as soone as his title by the legacy falleth, relinquish to take the profits of the thing bequeathed, for if one take the profits therof, he shal not after refuse the legacy: but yet his successor may if hee will refuse the taking of the profits to saue the house from peelding damages, or from arrears of rents if any such be, & like law is of a remainder, as is in legacy, for though in the case of a remainder & also of a devise as most men say, the freehold is cast vpon him by the lawe when the remainder or devise falleth: yet it is in his liberty to refuse the taking of the profits, & to refuse the remainder if he wil, as he might doe of a gift of lands, or goods, for if a gift be made to a man that refuseth to take it, the gift is void, & if it be made to a man that is absent: the gift taketh no effecte in him till hee assent: no more then if a man disseise one to an other mans vse, hee to whose vse the disseisin is made, hath nothing in the land, ne is no disseisor til he agree. And to such disseisours & giftes, an Abbot or Prior may disagree as wel as any other man, but after some men a Bishop, of a devise, or remainder that is made to the bishop, and to the Deane and Chapter, nor a Deane and a chapter of a devise, or remainder made to them, ne yet the master of a colledge of such a devise, or remainder made to him & to his brethren, may not disagree without the Chapter or brethren, for the Bishop of such landes as he hath with the Deane and chapter, ne the Deane nor master of such land as they haue with the Chapter or Brethren may not aunswere without the

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the chapter & brethren, & therefore some say that if the Deane or master will refuse, or disclaime in the landes, that they haue by the deuise or remainder, that disclaime without the Chapter or brethren is void. And therefore it is holden in the lawe, that if a Bishop be vouched to warrant, & the tenant bindeth him to the warranty by reason of a lease made to him by the Bishop, and by the Deane & the chapter, receiving a rent, that in that case the Bishop may not disclaime in the reuerſion without the assent of the Deane and Chapter: But yet if a reuerſion were granted to a Deane & a Chapter, and the Deane refuse, the graunt is void. And so it appeareth that a Deane may refuse to take a gift, or grant of landes, or goodes, or of a reuerſion made to him and to the chapter, and yet he may not disagree to a remainder, or deuise, & the diuersity is because the remainder and deuise he caſt vpon him without any assent, whereunto neither the Deane or the Chapter by themselves, may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, & in such giftes as I suppose an Infant may disagree as well as one of full age, but if a woman covert disagree to a gift, and the husband agree, that gift is good. D. What if lands in that case of a man & his wife bee charged with damages, or bee charged with more rent then the land is worth, and the husband die, shal the wife be charged to the damages, or to the rent? S. I thinke nay, if the wife refuse the occupation of the ground after her husbandes death,

and

The 33. Chapter.

and I think the same law to be if a lease be made to the husband and the wife yielding a greater rent then the land is worth, that the wife after the husbandes death may refuse the lease to saue her from the payment of the rent, & so may the successour of an Abbot. Do. And if the husband in that case ouerline the wife, & she make his executors and she, whether may his executors in likewise refuse the lease? S. If they haue goods sufficient of their testator to pay the rent, I think they may not refuse it, but if they haue not goods sufficient of their testator to pay the rent to the end of the terme, I think if they relinquish the occupation, they may by speciall pleading discharge themselves of the rent & the lease, & if they do not, they may lightly charge themselves of their owne goods. And if a lease bee made for terme of life, the remainder to an Abbot for terme of life of J. at S. reseruing a greater rent then the land is worth, & after the tenant for terme of life dieth, the Abbot may refuse the remainder for the cause before rehearsed, and in case that the Abbot assent to the remainder where by he is charged to the rent during the time that hee is Abbot, and after he dyeth or is deposed leauing the said J. at S. in that case his successor may discharge himselfe by refusing the occupation of the land, as is asforesayd. But I thinke that if such a remainder were made to a Deane, and to the Chapter, and the Deane agree without the assent of the Chapter, that in that case the Deane and the Chapter may afterward disagree to the remainder, and that the acte of the Deane with

out the assent of the Chapter shall not charge the Chap. in that behalf, and thus it appeareth though the meaning of the said chapter & article in the said summe be, that a prelate may not disagree unto a legacie, for hurting of a house, yet he may after the laws of the realm disagree thereto, where it should hurt his house. And if in a *præcipe quod reddat*, ther be but one tenant, be he spirituall or temporall, & he refuse by way of disclaimer in such case, where hee may disclaime by the law, there the land shal best in the demandant, & if there be 2. tenants then it shal best in his fellow, if hee will take the whole tenancy upon him, or els it shal best in the demandant. But if an Abbot or a lay man refuse the taking of the profits, and shew a speciall cause why it should hurt him if hee did assent, and be thereby discharged as is said before: In whom the land shal then best it is moze doubt, whereof I will no farther speake at this time. And thus it appeareth by diuers of the cases that be put in this chapter that he that is ignorant in the law of the realme, shal lack the true iudgement of conscience in many cases. For in many of these cases that may be done therein by the law, must also be obserued in conscience &c.

¶ Whether a gift made vnder a condition bee void if the soueraigne only breake the condition.

Cap. 34.

IN *fammā Rosella* in the title *Alienatio*, the 12. article, is asked this question, whether a gift made

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The 34. Chapter.

made vnder a certaine fourme may be annoyed
or reuoked, because the pzelates or soueraigne
onely did breake the fourme, and it is there an-
swered that it may not, for that the Deede of
the pzelate only ought not to hurt the Church,
and if those wordes (vnder a maner) be vnder-
stood of a gift vpon condition as they seeme to
bee, then the saide solution holdeth not in this
realme neither in law nor conscience. D. What
is then the lawe of England if a man enfeoffe
an Abbot by Deede indented vpon condition,
that if the Abbot paye not to the feoffor a cer-
taine summe of money at such a day, that then
it shalbe lawfull to the feffor to reenter, and at
that day the Abbot faileth of his payment, may
the feoffour lawfully reenter and put out the
Abbot?

S. Yea verily, for he had no right to the land,
but by the gift of the feffour, and his gift was
conditionel, & therefore if the condition be bro-
ken, it is lawfull by the Law of England for
the feffor to reenter, and to take his land again
& to hold it as in his first estate, by which reent-
ry after the lawes of the realme, he disproueth
the first liuery of seisin, and all the incise actes
done between the first feoffment and the reent-
ry, and inforceeth title in the Lawe, in whom
the default be that the condition was not per-
formed, whether in the Abbot or in his couent,
or in both, or in any other person whatsoever
he be, except it be in the feoffour himselfe. And
it is great diuersity betweene a clere gift made
to an Abbot without condition, and where it is
made with condition, for whye it is made with-
out

out condition, the acte of the Abbot onely shall not by the common lawe disherit the house, but it bee in very fewe cases, but yett vpon diuers Statutes the sufferance of the Abbot onely may disherite the house, as by his seassier, or by leasing of a crosse vpon a house against the Statute therof made, in which case the house there by shall leese the land, and some say that by the common law vpon this disclaimer in auowry, a writ of right of disclaimer lieth, but if the gift bee vpon condition, it standeth neither with law nor conscience, that the Abbot should haue any more perfect or sure estate then was giuen vnto him, and therefore as the said estate was made to the house vpon condition, so that estate may be auoided for not performing of the condition: And I thinke verily that this I haue said is to be holden in this Realm, both in the Law and conscience, and that the decrees of the Church to the contrarie, binde not in this case. But if the landes bee giuen to an Abbot, and to his Couent, to the intent to find a Lāp, or to giue certaine almes to poore men, though the intent be not in those cases fulfilled, yett the feoffour, nor his heire may not reenter, for hee reserved no reentry by expresse wordes, ne in the wordes, when he said, to the intent to finde a Lampe, or to giue almes &c. is implied no reentry, ne the feoffor, nor his heires shall haue no remedie in such cases, vnlesse it bee within the case of the Statute of Westminster the second that giueth the Cellauit de Cantaria.

¶ 4.

¶ Who-

The 35. Chapter.

¶ Whether a couenant made vpon a gift to the Church, that it shall not be aliened, be good.

Cap. 35.

In the said summe, called Summa Rosella, the said title Alienatio, the 13. article, is asked this question, whether a couenant made vpon a gift to the church, that it shall not bee aliened be good. And the same questiō is moued again in the sayde Summa called Rosella, in the tytle Cōditio the first article, & in Summa Angelica, in the title Donatio prima, the 51. & 52. articles, & the intent of the questiō there is whether notwithstanding that the condition be good to some alienations, whether that yet it bee good to restrain alienations for the redemption of the which bee in captiuitie vnder the Infidels, or for the greater aduantage to the house, & though the better opinion be there, the condition may not be broken for redemption of them that be in captiuitie: yet it is in maner a whole opinion that it may be sold for the greater aduantage to the house, for it is sayd there that it may not be taken, but that the intent of the giuer was so, & therefore they call the condition that prohibiteth it to be sold, *conditio turpis*, that is to say, a vile condition, wherefore they regard it not: but verily as I take it, if a condition may restrain any maner of alienation, then it shall as well restrain Alienations for the two causes before rehearsed, as for any other causes, and though me thinketh that the condition is good, &
after

after the laws of the Realme, that vpon giftes to the Church restrayneth alienations, yet I shall touch one reason that is made to the contrary, that is this; There is a cleere ground in the law, that if a feoffment bee made to a common person in fee vpon condition that the feoffee shal not alien to no man, that condition is hold, because it is contrary to the estate of a fee simple to binde him that hath the estate that hee should not alien if hee list, and some say that an Abbot that hath land to him and to his successors hath as high and as persit a fee simple as hath a lay man that hath lande to him and to his heires, and therefore they say that it is as well against the Law of the Realme to prohibite that the Abbot shal not alien, as it is to prohibite a lay man thereof, and though it bee therein true as they say, as to the highnesse of the estate, yet mee thinketh there is a great diuersitie betwene the cases concerning their alienations: for when lands be giuen in fee simple to a common person, the intent of the Law is that the feoffee shal haue power to alien, and if he doe alien, it is not against the intent of the Law, ne yet against the intent of the feffor, but when landes be giuen to an Abbot and to his successors, the intent of the lawe is, and also of the giuer (as it is to presume) that it shoulde remaine in the house for euer, and therefore it is called Mortmain, that is to say, a dead hand, as to who sayeth that it shall abide there alway as a thing dead to the house. And therefore as I suppose the law will suffer that condition to be good that is made to restraine that such Mort-

¶ iij.

maine

The 35. Chapter.

main should not be aliened and that yet it may
prohibite the same condition to bee made vpon
a feoffment made in fee simple to a man and to
his heires: for that is the most high, the most
free, and the most purest state that is in þe law.
But the Law suffereth such a condition to bee
made vpon a gift in taylor because the Statute
prohibiterh that no alienation should be made
thereof. And then as the Law suffereth such a
condition vpon a gift in Mortmaine, that is to
say, that it shall not be aliened, to be good: then
it Judgeth the condition also according to the
wordes, that is to say, if the condition bee ge-
nerall that they shall alien to no man, as this
case is that it shall be taken generally according
to the wordes, and it shall not be taken that the
intent of the giuer was otherwise then hee ex-
pressed in his gift, though percase if hee were
asked himseife and the question were asked
him whether hee would be contented it should
bee aliened for the said two causes or not, hee
would say ye, but when he is dead no mā hath
authoritie to interpret his gift otherwise then
the law suffereth, nor otherwise then the wordes
of the gift bee. And if the condition be speciall,
that is to say, that the land shall not be aliened
to such a man or such a man, then the condition
shall bee taken according to the wordes, & then
they may be aliened as for that condition to as-
signe other but to them to whom it is expressly
prohibited that the lande should not be aliened
to. And if the landes in that case bee aliened to
one that is not excepted in the condition, the he
may alien the land to him that is first excepted
with

without breaking of the condition, for conditions be taken straitly in the law and without equity. And thus me thinketh that because the sayd condition is generall and restrayneth all alienations, that it may not be aliened neyther by the law of the Realme, ne yet by conscience, no moze for the sayd two causes, then it may for any other cause, and this case must of necessity be iudged after the rules and groundes of the Lawe of the Realme, and after no other law as me seemeth.

¶ If the patron present not within vi. moneths, who shall present.

Cap. 36.

In the same sum, called Summa Rosella in § title Beneficium in principio it is asked, if the patron present not within six moneths who shall present, and within what time the presentment must be made. And it is answered there that if the patron present not within six moneths, that the Chapter shall have six moneths to present, and if the Chapter present not within vi. moneths, that then the Bishop shall have other vi. moneths. And if he be negligent, then the Metropolitan shall have other vi. moneths, and if he present not, then the presentment is deuolute to the Patriarche. And if the Metropolitan have no superior vnder the Pope, then the presentment is deuolute to the Pope.

¶ *lit.*

Pope.

The 36. Chapter.

Pope. And so as it is said there the Archbishop shall supply the negligence of the Bishop if he be not exempt, and if he be exempt, the presentment immediately shall fall upon the Bishop to the Pope. And as I suppose these diuersities hold not in the lawes of the realme. Do. Then I pray thee shew mee who shall present by the lawes of the Realme if the patron doe not present within vi. monethes? **St.** Then for default of the patron the Bishop shall present vnles the king be patron, and if the Bishop present not within vi. monethes, then the Metropolitane shall present, whether the Bishop be exempt or not. And if the Metropolitane present not within the time limited by the law, then there be diuers opinions who shall present, for some say the pope shall present, as it is said before, and some say, the king shall present.

D. What reason make they that say the king should present in that case? **St.** This is their reason, they say the king is patron paramount of all the benefices within the Realme. And they say further that the king and his progenitors kings of England without time of minde haue had authoritie to determine the right of patronages in this realme in their own courts, and are bound to see their subiectes haue right in that behalfe within the Realme, and that in that case from hence lyeth no appeale. And then they say that if the Pope in this case should present, that then the king should not only leese his Patronage paramount, but also that hee should not sometime be able to doe right to his subiectes.

Do. In

Do. In what case were that? S. It is in this case: The Law of the realme is, that if a benefice fall void, that the patron shall present within vi. monethes, and if he doe not that then the Ordinarie shall present, but yet the Lawe is farther in this case, that if the Patron present before the Ordinarie put in his Clerke, that then the Patron of right shall misse his presentment, and so it is though the time should fall after to the Metropolitan, or to the Pope, and if the presentment should fall to the Pope, then though the Advowson abode still void, so that the Patron might of right present, yet the Patron should not knowe to whom hee should present, vntlesse hee should goe to the Pope, and so hee should faile of right within the Realme. And if percase hee went to the Pope and presented an able Clerke vnto him, and yet his Clerke were refused and an other put in at the collation of the Pope, or at the presentment of a straunger, yet the Patron could haue no remedie for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the lawe will suffer no title in this case to fall to the Pope. And they say, that for a like reason it is that the lawe of the Realme will not allowe an excommunication that is certified into the kings Court vnder the Popes Bulles; For if the partie offered sufficient amends, and yet could not obtaine his letters of absolution, the King should not knowe to whom to write for the letters of Absolution, and the partie could not haue right, and that the Lawe will in no wise

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wise suffer. Do. The Patron in that case may present to the Ordinary as long as the church is void, and if the Ordinary accept him not, the Patron may haue his remedie against him within the Realme. But if the Pope will put in an Incumbent before the Patron present, it is reason that he haue the presentment as mee seemeth before the king. S. When the Ordinary hath surceessed his time, hee hath lost his power as to that presentment, specially if the collation bee deuolute to the Pope. And also when the presentment is in the Metropolitane, he shall put in the Clerk himselfe and not the Ordinary, and so there is no default in the Ordinary though he present not the Clerk of the Patron, if his time bee past, and so there lyeth no remedie against him for the Patron.

D. Though the Incumbent abide still out of the realm, yet may a Quare impedit lie against him within the Realme, and if the Incumbent make default vpon the distresse and appeare not to shew his title: then the patron shall haue a writ to the Bishop according to the Statute, and so he is not without remedie.

S. But in this case hee cannot be summoned, attached, nor distrained, within the Realme. D. He may be summoned by the Church as the tenant may in a Writ of right of Aduowson. Sc. There the aduowson is in demaund, & here the presentment is onely in debate, and so hee cannot bee summoned by the Church here no moze then if it were in a writ of Annuitie, and there the common returne is, quod Clericus est beneficiatus, non habes laicum feod' vbi potest sum-

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summoneri. And though hee might be summoned in the Church, yet he might neither bee attached nor distrained there, and so the Patron should be without remedy. D. And if hee were without remedy, hee should yet bee in as good case as he should be if the king should present, for if the title should be given to the king, the Patron had lost his presentment clerely for the time, though the Church abide still void. For I haue heard say that in such presentmentes no time after the Lawe of the Realme runneth vnto the king. St. That is true, but there the presentment should be taken from him by right and by the Lawe, and heere it should be taken from him against the Lawe, and there as the Lawe could not help him, and that the law will not suffer. Do. Yet we thinke alway that the title of the Laps in such case is given by the lawe of the Church, & not by the temporall law, & therefore it forceth but little what the temporall law will in it as mee seemeth. S. In such countries where the Pope hath power to determine the right of temporall things, I thinke it is as thou sayst, but in this realme it is not so. And the right of presentment is a temporal thing, and a temporal inheritance, & therefore I thinke it belongeth to the kings law to determine, & also to make lawes who shall present after vi. monethes aswell as before, so that the title of examination of abilitie or nonabilitie bee not thereby taken from the Ordinary And in likewise it is of auoydauce of benefices, that is to say, then it shalbe iudged by the kings Lawes when a benefice shall be sayd void, & when not, and

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and not by the Law of the Church, as when a
 parson is made a Bishop, or accepteth another
 benefice without a licence, or resigneth, or is
 deprived, in these cases the common law saith,
 that the benefice is void, and so they should be,
 though a law were made by the Church to the
 contrary, and so if the Pope should have any
 tye in this case to present, it should bee by the
 Law of the Realme. And I have not seene ne
 heard that the Law of the Realme hath given
 any tye to the Pope to determine any tempo-
 rall thing that may be lawfully determined by
 the kinges court. D. It seemeth by that reason
 that thou hast made now, that thou preferrest
 the kinges authoritie in presentmentes before
 the popes, & that me thinketh should not stand
 with the Law of God, for the Pope is the vi-
 car generall under God. St. That I have said
 proveth not that for the highest preferment in
 presentmentes hee is to have authoritie to exa-
 mine the ability of the Parson that is presen-
 ted, for if the presentee be able, is sufficient to the
 discharge of the Ordinarie, by whomsoever he
 be presented, and that authoritie is not denied
 by the Lawe of the Realme to belong alway to
 the spirituall iurisdiction; but my meaning is,
 that as to the right of presentmentes and to de-
 termine who ought to present and who not,
 and at what time, and when the Church shall
 be iudged to be void, & when not, belong to the
 King & to his Lawes, for else it were a thing
 in painefor him to hold plea of Dowersons, or
 to determine the right of patronage in his own
 courts, and not to have authoritie to determine
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the right thereof, and those claimes seemeth not to be against the Law of God. And so me seemeth in this case the presentment is given the King. D. And if the King should have right to present, then might the Church happen to continue void for ever, for as we have sayd before no time runneth to the King in such presentmentes. S. If any such case happen if the King present not, then may the Ordinary set in a deputy to serue the cure as he may doe when negligence is in other patrons that may present & doe not, and also it cannot be thought that the King which hath the rule & gouernance ouer the people, not onely of their bodie but also of their soules, wil hurt his conscience and suffer a benefice continually to stand without a Curat, no more then hee doth in Adulterions that be of his owne presentment.

- ¶ Whether the presentment and collation of benefices and dignities, voiding at Rome, belongeth onely to the Pope.

Cap. 37.

In the same sum, called Summa Rosella, in the title Beneficiū primum, in the 13. article, It is said ¶ benefices, dignities, & personages, holding in the court of Rome may not be given but by the Pope, & likewise of the Popes seruants and of other that come and goe from the Court, if they dye in places nigh to the Court within two dayes iourney, all these belong to the Pope, but if the Pope present not with-
in a

The 37. Chapter.

in a moneth: then after þ moneth they to whom it belongeth to present, may present by themselves only, or by their vicar generall if they be in farre partes, & these sayings hold not in the law of the Realme. D. What is the cause that they hold not in this realme, as wel as in all other realmes? S. One cause is this; The king in this Realme according to the ancient right of his Crowne, of all his Adowsons that bee of his patronage ought to present. And in likewise other Patrons of benefices of their presentment, & the pice of þ right of presentmentes of benefices within this Realme, belong to the King and his crowne. And these titles cannot be taken from the King and his subiectes, but by their assent, and the law that is made therein to put away the title, bindeth not in this realme; And ouer that befoze the Statute of 25. E. 3. there was a great inconuenience and mischief, by reason of diuers prouissions & reservations that the Pope made to the benefices of this Realme contrarie to the olde right of the King and other Patrons of this Realme, as well to the Archbishops, Bishops, Deanries and Abbies, as to other dignities & benefices of the Church. And many times aliens thereby had benefices within the Realme that vnderstood not the English tongue, so þ they could not counsaile ne comfort the people when need required, and by that occasiõ great riches was conueyed out of the Realme: wherefoze to auoid such inconuenience, it was ordained by the said Statute þ all patrons as well spiritual as tempozal should haue the presentment

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ments freely, & in case the collation or prouision were made by the Pope in disturbance of any Spirituall Patron, that then for that time the King should haue the presentment, & if it were in disturbance of any laye Patron, that then if the patron presented not within the halfe yere after such voidance, nor the bishop of the place within a moneth after the halfe yere: that then the king should haue also the presentment, and that the king should haue the profits of the benefices so occupied by prouision, except Abbeyes & Priories, & other houses that haue Colledge & couent, & there the colledge & couent to haue the profits, and because the statute is generall & excepteth not such benefices as shall boide in the Court of Rome, or in such other place as befoze appeareth, therefore they be taken to be within the prouision of the said statute aswell as the benefices that boide within the Realme, & all prouisors & executors of the sayde collations & prouisions, & al their attornies, notaries & maintainers, shalbe out of the protection of the King, & shal haue like punishment as they should haue for executing of benefices voiding within the realm. D. But I cannot see how the said statute may stand with conscience, that so farre restraineth the Pope of his liberty, which as mee seemeth hee ought in this case of right to haue. S. Because as I suppose that patrons ought of right to haue their presentments, vnder such manner as they claime them in this realm, as I haue sayde befoze, & as in the 26. chapter of this booke appeareth more at large. And also forasmuch as it appeareth euidentlie that

The 38. Chapter.

that great inconvenience followed bypon the
sayd pꝛouisions, and that the said estatute was
made to auoide the same, which sith that time
hath been suffered by the Pope, and hath bin al-
way bled in this Realme without resistance
that the sayde estatute should therefore stande
with good conscience.

- ¶ If a house by chaunce fall vpon a horse that
is borrowed, who shall beare
the losse.

Cap. 38.

In the said summe called Summa Rosella, in
the title Casus fortuitus, in the beginning is
put this case. If a man lend another a horse,
which is called there Depositum, & a house by
chance falleth vpon the horse, whether in that
case hee shall aunswere for the horse? And it is
aunswere there, that if the house were like to
fal, that then it cannot be takē as a chance, but
as the default of him that had the horse deliue-
red to him: But if the house were strong, & of
likelihood and by common presumption in no
danger of falling, but that it fell by sodaine
tempest, or such other casualtie, that then it
shal be taken as a chance, and hee that had the
keeping of h̄ horse shal be discharged, & though
this diuerslye agreeth with the Lawes of the
Realme, yet for the moze playner declaration
therof, and for the moze like cases and chances
that may happen to goodes, that a man hath
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in his keeping that bee not his owne. I shal ad
a litle moze therto that shalbe somewhat neces-
sary as mee thinketh to the ordering of conscie-
ence. First a man may haue of an other by way
of lene or borroweing, money, coine, swine, and
such other things where the same thing cannot
be deliuered if it be occupied, but another thing
of like nature & like value must bee deliuered
for it, & such things be that they be lent to, may
by force of the lene vse as his owne. And ther-
fore if they perish, it is at his teopardy, & this
is most properly called a lene. Also a man may
lend to an other a horse, an ore, a cart, or such o-
ther things that may bee deliuered againe, and
they by force of that lene may be used and occu-
pied reasonably in such manner as they were
borrowed for, or as it was agreed in the time of
the lene, that they should be occupied, & if such
things be occupied otherwise then according to
the intent of the lene, & in that occupation they
perish, in what wise soeuer they perish, so it bee
not in default of the owner, he that borrowed
them shalbe charged therewith in law & conscie-
ence, & if he that borrowed them occupy them in
such maner as they were lent for, & in that oc-
cupation they perish in default of him that they
were lent to, then hee shall aunswere for them.
And if they perishe not through his default,
then hee that oweth them shall beare the losse.
Also if a man haue goods to keepe to a certain
day, for a certaine recompence for the keeping,
he shall stand charged or not charged, after as
defaulte or no default shall bee in him as be-
fore appeareth, and so it is if he haue nothing

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The 38. Chapter.

for the keeping, but if hee haue for the keeping, & make promise at the time of the deliuerie to redeliuer them safe at his perill, then hee shall be charged with all chances that may fall. But if he make that promise & haue nothing for keeping, I thinke he is bound to no such casualties but that be wilful & his owne default, for that is a nude, or a naked promise, wherupon as I suppose no action lieth. Also if a mā find goods of an other, if they bee after hurt or lost by wilful negligence, hee shall be charged to the owner, but if they be lost by other casualty, as if they be laide in a house that by chance is burned, or if he deliuer the to an other to keepe that runneth away with the, I thinke he be discharged; and these diuersities hold most cōmonly vpon pledges, or where a man hireth goods of his neighebor to a certain day for certaine mony, & many other diuersities be in the lawe of the Realme, what shall be to the teopardy of the one, & what of the other, which I will not speake of at this time: And by this it may appeare that it is cōmonly holdē in the laws of England if a common carier go by the wates that be dangerous for robbing, or driue by night, or in other inconuenient time, & be robbed, or if he overcharge a horse, whereby he falleth into the water or otherwise, so that the stuffe is hurt or impaired, that hee shall stand charged for his misdemeanour, and if hee would percase refuse to cary it, vnles promise were made vnto him that hee shall not be charged for no misdemeanour that should be in him, the promise were bolde; for it were against reason & against good maners
and

and so it is in all other cases like. And all these diuersities be granted by secundary conclusions deriued vpon the Lawe of reason without any Statute made in that behalfe. And peraduenture lawes, and the conclusions therein, bee the more platne & the more open. For if any Statute were made therein, I thinke verily no doubts, & questions would rise vpon the Statute, then doth now when they be onely argued and iudged after the common lawe,

- ¶ If a priest haue won much goodes by saying of Masse, whether hee may giue those goods or make a will of them,

Cap. 39.

In the said sum called Summa Rosella in the title Clericus quartus the third article, is asked this question; If a priest haue won much goods by saying of masse, whether he may giue those goods or make a will of them? whereto it is answered there, that hee may giue them, or make a will of them, specially when a man bequeeth mony for to haue Masses said for him: & the like law is of such things as a Clarke winneth by the reason of an office; For it is sayd there, that such thinges come to him by reason of his owne person, which sayings I thinke accord to the law of this realme. But forasmuch as in the said article & in diuers other places of this said chapter, & in diuers other chapters of the said Summe, is put great diuersity betwene such goods, as a Clarke hath by reason of his

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The 39. Chapter.

church, and such goods as he hath by reason of his person, & that he must dispose such goodes as he hath by reason of his church in such manner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods & come by reason of his own person, therfore I shall a little touch what spirituall men may doe with their goods after the law of the Realme.

First a Bishop of such goods as he hath with the Deane and Chapter hee may neither make gift nor bequest, but of such goods as he hath of his own by reason of his Church or of & gift of his auncestors or of any other, or of his patrimony, he may both make giftes & bequestes lawfully. And an Abbor of the goodes of his Church may make a gift, and that gift is good as to the Lawe. But what it is in Conscience that is after the cause and intent and qualitie of the gift, for if it bee so much that it notable hurteth the house or the Couent, or if he giue away the bookes, or the chalices, or such other things as beldg to the service of God, he offendeth in conscience, and yet he is not punishable in the Law, ne yet by Sub pena after some men, ne in none otherwise but by the Lawe of the church, as a waster of the goods of his monasterie. But neuertheless I will not fully holde that opinion, as to that that belongeth necessarily to the service of God, whether any remedy lye against him or not, but remit it to the iudgment of other. And a Deane and Chapter, and a master & brethren of goods that they haue to theselues, & also of goods that they haue with
the

the Chapter & brethren, the same diuerſitie holdeth as appeareth beſore of a Biſhop and the Deane & Chapter, except that in the caſe of a maſter & brethren the goods ſhalbe ordered as ſhalbe aſſigned by the foundation. And moꝛeouer of a Parſon of a Church, Vicar & Chauntry prielt, oꝛ ſuch other, al ſuch goods as they haue aſwell ſuch as they haue by reaſon of the Parſonage, Vicarage, oꝛ Chauntrie, as that they haue by reaſon of their owne perſon they may lawfully giue and bequeath where they wil after the common Law; And if they diſpoſe part among the pariſhioners & part to the building of Churches, oꝛ giue part to the Ordinary, oꝛ to pooꝛe men, oꝛ in ſuch other maner, as it is appointed by the law of the church, they offend not therein, vnles they think themſelues bounden thereto by duety, & by authoritie of the Law of the church, not regarding the kings lawes, foꝛ if they doe ſo, it ſcemeth they reſiſt the ordinance of God, which hath giue power to princes to make lawes, but there as the Pope hath ſouerantie in tempoꝛall thinges as hee hath in ſpiritual thinges, there ſome ſay that the goods of prieltes muſt in conſcience be diſpoſed as is contayned in the ſayd ſumme, but that holdeth not in this Realme, foꝛ the goods of ſpirituall mē be tēpoꝛal in what maner ſocuer they come to them and muſt be ordered after the tempoꝛal law as the goods of the tempoꝛal mē muſt be. Howbeit if there were a ſtatute made in this caſe of like effect in many pointes, as the law of the Church is, I thinke it were a right good and a profitable ſtatute.

B. 14.

¶ Who

The 40. Chapter.

¶ Who shall succcede a Clerke that dyeth intestate.

Cap. 40.

In the said sum called Rosella in the Chapter clericus quartus the vij. article, is asked this question, who shall succcede to a Clerke that dieth Intestate, & it is answered that in goodes gotten by reason of the church, the church shall succceed. But in other goods his kinsmen shall succceed after the order of the law, & if there bee no kinsman, then the church shall succceed. And it is said further that goods gotten by a Canon secular by reason of his church or prebend shall not go to his successour in the prebend, but to the Chapter. But where one that is beneficed is not of the congregation, but hee hath a benefice clerely seporate, as if he be a person of a parish Church or is a president, or an Archdeacon not beneficed by the Chapter, then the goods gotten by reason of his benefice, shall go to his successour & not to the Chapter, and none of these sayings hold place in the lawes of England. D. What is then the law if a Parson of a Church, or a Vicar in the Countrey dye intestate, or if a Canon secular be also a Parson and haue goods by reason thereof, and also by a Prebende that hee hath in a Cathedral Church, & hee dye intestate, who shall haue his goods? **St. At the common Law the Ordinarie** in al these cases may administer the goods and after hee must comunit administration to the next

next faithfull friendes of him that is dead intestate that will desire it, as he is bound to doe where lay men that haue goodes die intestate. And if no man desire to haue administration, then the Ordinary may administer and see the debtes payed, and hee must beware that hee pay the debtes after such order as is appointed in the common law, for if he pay debtes vpon simple contracts before an obligation, he shall bee compelled to pay the debt vpon the obligation of his owne goods, if there be no goods sufficient of him that died intestate, and though it be suffered in such case that the Ordinary may pay pound and pound like, that is to appoyntion the goods among the debtors after his discretion, yet by the rigour of the common Law, hee might be charged to him that can first haue his iudgment against him. And furthermore by that is said afore in the last Chapter it appeareth that if a Bishop that hath goods of his patrimony, or a master of a Colledge, or a Dean of goods that they haue of their owne onely to themselves dye intestate, that the Ordinary shall commit administration thereof, as before appeareth, and if they make executors then the executors shall haue the administration thereof: But the heires nor the kinsmen by that reason onely that they be heires or of kin to him that is deceased, shall haue no meddling to his goods, except it be by custom of some countries where the heires shall haue their lons; Or where the children (the debtes and legacies payed) shall haue a reasonable part of the goodes after the custome of the country.

R. 114.

¶ If

The 41. Chapter.

¶ If a man be outlawed of felony, or be attained for murder or felony, or that is an ascismus, may be slaine by euery straunger.

Cap. 41.

IT appeareth in this said sum called Summa Angelica in the xxi. Cha. in the title of Ascismus the 2. Paragrafe, that he is an Ascismus that will slay men for money at the instance of euery man that will moue him to it, and such a man may lawfully be slaine, not onely by the iudge, but by euery private person. But it is said there in the 4. paragrafe, that he must first be iudged by law as an Ascismus ere he may be slaine, or his goods seised. And it is said further there in the 2. paragrafe, that also in conscience such an Ascismus may be slaine if it bee done through a zeale of iustice and else not. Is not the law of the realme likewise of men outlawed, abiured, or iudged for felony?

S. In the law of the realme there is no such law, that a man shal bee adiudged as an Ascismus, ne if a man be in full purpose for a certain summe of money that hee hath receiued to slay a man, yet it is no felony, ne murder in the law till he hath done the act, for intent of felony nor murder is not punishable by the common lawe of the Realme, though it be deadly Anne befoze God, but in treason or in some other particular cases by Statute that turent may be punished. And though a man in such a case kill a man for money: yet hee shall not bee admitted that he

hee is an Ascismus. For as it is sayde before there is no such terme of Ascismus in the lawe of the Realme, but he shal in such case be arraigned vpon the murther. And if he confesse it or plead that he is not guilty, & is found guilty by xii. men, he shall haue iudgement of life, and of member, and shal forfeit his lands and goods. And like Lawe is if in appeal brought of the murther, if he stand dumbe and will not answer to the murther, hee shall bee attainted of the murther, & shal forfeit life, landes & goods: But if he bee arraigned of the murther vpon an Indictment at the Kinges suit, and thereupon standeth dumbe and will not answer, there he shal not be attainted of the murther, but he shal haue paine foxt and dure, that is to say, hee shall be pressed to death, and he shal there forfeit his goods, and not his lands. But in none of these cases (that is to say) though a man bee Outlawed for murther or felony, or bee abjured, or that hee bee otherwise attainted: yet it is not lawfull for any man to murther him, or slay him, ne to put him in execution but by authoritie of the Kinges Lawes. Insomuch that if a man bee adiudged to haue paine foxt and dure, and the officer beheadeth him, or on the contrary wise putteth him to paine foxt and dure, where he should behead him, hee offendeth the lawe. And if an officer which hath authoritie to put a man to death, may not put him to death but according to the iudgement, then me thinketh it should follow that moze stronger, a straunger may not put such a man to death of his owne authoritie without commaundement of

The 42. Chapter.

of the Law. But if the iudgement bee that hee shalbe hanged in chaines, & the officer hangeth him in other things and not in chaines, I suppose hee is not guilty of his death: But some say he shal there make a fine to h^e King, because he hath not followed the wordes of the iudgement.

Also if a man that is no officer would arrest a man that is outlawed, abjured, or attainted of murder or felony, as is aforesaid, & hee disobeyeth the rest, & by reason of the disobedience he is slaine, I suppose the other shal not be impeached for his death, for it is lawfull vnto every man to take such persons & to bring them forth that they may be ordred according to the law. But if a Capias be directed vnto the Shyriife to take a man in an action of debt or trespassse, there no man may take the man, but hee haue authority from the Shyriife. And if any man attempt of his own authority to take him, & he resisteth, & in the resisting is slaine, he that would haue taken him is guilty of his death.

¶ Whether a man shall be bounden by the act or offence of his seruant or officer.

Cap. 42.

In the said summe called Summa Angelica, in the title Dominus iiii. paragrafe, is asked this question, whether a man shalbe charged for his household; And it is said that ther be shal when the household offendeth in an office or ministrey

mistry that the Master is the chiefe Officer of,
 and he hath the worke and the profit of the hou-
 shold: For it shall be his default that he would
 chose such seruantes, for hee ought to appointe
 honest persons; But it is said there, that it is
 to be vnderstood ciuilly, & not criminally, wher-
 by as is sayd there, hee that is a gouernour is
 bound for the offence of his officers, & that the
 same is to be holden of a Captain, that he shal
 be bound for offence of his suters, and an
 host for his guest, and such other. Neuertheles
 it is said there that certaine Doctors there re-
 hearded said therto, that if the office be an open
 or publike office, as an office of power, or other
 like; It sufficeth to bring forth him that of-
 fended: But it is otherwise if it be not a pub-
 like office, but an host or a Tauerne, or other
 like. But if the household offend not in the of-
 fice, the Lord is not bound as to the Law, but
 in conscience he is bound if hee were in default
 by not correcting them, for hee is bound to cor-
 rect them both by word and example, and if
 he find any incorrigible, he is bound to put him
 away, except that he haue presumptions, that if
 he do so, he will be the worse, and then hee may
 doe that he thinketh best, and he is excused, and
 els not. For to such persons it is said, Error qui
 non resistitur, approbatur: (that is to say) an
 Error that is not resisted is approoued. And
 though diuers of the sayings before rehearsed
 agree with the Law of the Realme, yet all doe
 not so, and also they that do are to be obserued
 by authoritie of the law of the Realme, & not by
 the authoritie alleaged in the said Paragrafe.

And

The 42. Chapter.

And therefore I intende to treate somewhat where the Master shall be charged by his seruant, or depute, or by them that be vnder him in any office, & where not, and then I intend to touch some other thinges where the Master after the Latours of the Realme shall bee charged by the act of his seruant in other cases not concerning offices, and where not.

First if a man be committed to ward vpon arrerages of Accompt, and the keeper of the prison suffereth him to goe at large, then an action of debt shall lye against him. And if he bee not sufficient, then it lyeth against him that committed the keeping of the prison vnto him, and that is by reason of the Statute of West. the 2. cap. 11. Also if Bailifes of Franchises that haue Returne of writs make a false returne, the partie shall haue auerrement against it, as well of too little issues as of other things, as well as he shall haue against the Shirefe, but all the punishment shall be only vpon the bailife, and not vpon the Lord of the Franchise, and that doth appeare by the Statute made in the first yere of king Edward the 3. the first Chapter. But if an Under-shirefe make a returne whereupon the Shirefe shall be amerced, there the high Shirefe shall be amerced, for the returne is made expressly in his name. But if it be a false returne whereupon an action of Disceit lyeth, in that case it may bee brought against the Under-shirefe. And see thereof the Statute that is called Statutum de male returnantibus breuia.

Also if the kings Butler make deputies, he shall aunswere for his deputies as for himself,

as

as appeareth in the Statute made in the 25. pere
of King Edward the 3. De prodicionibus the
21. Chapter.

Also in þ Statute that is called Statutu scac-
carij it is enacted among other things that no
officer of the Eschequer shal put any clark vnder
him, but such as he wil aunswere for. And
forasmuch as the Statute is general: it seemeth
that he shall answere as well for an vntruth in
any such clarke as for an ouersight.

Also in the 14. pere of King E. the 3. ca. 9. it is
enacted, that al Gailes shalbe appointed again
to the Shires, and that the Shirife shall haue
the keeping of them, and that the Shirife shal
make such vndergardetnes for the which they
will aunswere. And neuerthelesse I suppose
that if there be an escape by default of the Gai-
ler, that the King may charge the Gailer if he
will. But it is no doubt but he may charge the
Shirife by reason of his Statute if he wil. But
if it bee a wilfull escape in the Gailer which is
felony in him, the Shirife shal not be bound to
aunswere to the felony, ne none other but the
Gailer himselfe, and they that assented to him.

Also if a man haue a Shirifewike, Constable-
shiptype, or Bailiwike in fee, whereby he hath
the keeping of prisoners, if he let any to reple-
vine that be not repleuissable, and thereof bee
attaint, hee shall leese the office &c. And if it be
an Undershirife, Constable or Bayliffe that
hath the keeping of the pylson, that doth it
without knowledge of the Lord, he shall haue
imprisonment by three peeres, and after shal be
raunsomed at the Kinges will, as appeareth
in

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in the Statute of West, the 1. the xv. Chap. And so it appeareth that in this case, hee that is the Lord of the prison is not bounde to aunswere for the offence of them that haue the rule of the prison vnder him, but that they shall haue the punishment themselves for their misdemeanour. Also there is a Statute made in the xxvii. yere of King Edw. the 3. the xix. Chapter that is called the Statute of the Staple, whereby it is ordeined that no Marchant, ne none other mā shall not leese their goods for the Trespas, or forsaith of their seruants, vnlesse it be by commaundement of his Master, or that he offend in the office that his Master hath put him in, or els, that the Master shal be bound to an aunswere for the deed of his seruant by the Law marchant, as in some place it is vled.

Also it is enacted in the xlii. yere of King Edward the 3. the viii. Chapter, that Wapentakes and Hundreds, that be seuered from the Counties shall be adioined againe vnto them, and that if the Shirife hold them in his owne hands, that he shall put in them such baylifes that haue landes sufficient, and those for which hee will aunswere, and that if hee let them to ferme, that they bee let to the auncient ferme, but after it is prohibited by the Statute of the xlii. yere of King Henry the vi. the x. Chapter. That no Shirife shall let his Bailiwikes, nor wapentakes to ferme. And when they be once in the Shrifes owne handes, and the Shrifes put in Bailifes, they be but as Underbailifes to the King and the Shirife the high bailife, and they in maner the Shrifes seruantes and put in
only

onely by him. And therefore by the said Statute of King Ed. the 3. hee shall aunswere for them if they offend in their office. but if the Shyrife let the to ferme, then though the Shyrife offend the Statute in that doing, yet whether hee shall be charged for their misdemeanors in the office or not, is a great doubt to some men, for they say that this Statute is onely to be understood where the bailiwicks be in the Shyryfes hands, but here they be not so, ne the bailiffes be not his seruants, but his fermours: And therefore they say, that if the Shyrife shal be charged for them, it is by the common Lawe, & not by the Statute aforesaid. Also in the 2. peere of King Henry the vi. the xiiij. Chap. it is enacted, that Officers by patent in euery court of the King, that by vertue of their office haue power to make clarkes in the said courts, shal be charged & swoyne to make such clarkes vnder them, for whom they will aunswere. Also the Hospitallers & Templers be prohibite they shal hold no plee that belong to the Kinges Courts, vpon pain to peld damages to the party grieved, & to make raunsome to the King: that the superiours shal answere for their obedienters, as for their owne deed. West. 2. cap. 43. Also the Serieant of the Catey shall satisfie all the debtes, damages, and executions that shall bee recovered against any that is puruitor, or achator, vnder him, that offend against the Statute of xxvi. of Edw. the iii. or against this Statute of xxviii. of Henry the vi. in case the puruitor, or achator bee not sufficient &c. And the partie plaintife shal haue a Scire facias against & sayd

ser

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sergeant in this case to haue execution, as appeareth in the 24. yeare of King Henry the vi. the 1. Chapter.

Also if a man be sent to prison vpon a Statute marchant by the Maior, befoze whom the recognisance was taken, & the Gaillor will not receiue him, he shall answere for the debt if hee haue wherewith, & if not then he shall answere that committed the Gaile to him, as appeareth in the Statute called the Statute marchant.

Also if Outragious tolle bee taken in the towne Marchant, if it be the Kings towne let to farme, the king shall take the franchise of the market into his handes; And if it bee done by the Lord of the Towne, the king shall doe in likewise: And if it be done by the Bailife, vnknowing to the Lord, he shall recid againe as much as hee hath taken, and shall haue imprisonment of xl. daies: And so it appeareth that the Lord in this case shall not answere for his Bailife, West, the 1. cap. 30. And in all the cases befoze rehearsed, where the superiour is charged by the default of him that is vnder him, hee in whose default his superiour is so charged, is bound in conscience to restore him that is so charged through his default: Except the case befoze rehearsed of the Hospitallers, for al that the obediencer hath, is the superiours if he will take it. And therfoze what recompence shall be made by the obediencer in that case, is al at the will of the superiour. And now I intend to shewe thee some particuler cases, where the master after the laws of this realm shall be charged by the act of his seruant, bailife, or deputie, & where

where not, and so for to make an ende of this Chapter.

First for trespassse of battery, or wrongfull entry into landes or tenements, ne yet for felony or murther, the master shal not be charged for his seruaunt, vnlesse hee did it by his commaundement.

Also if a seruant borrow money in his masters name, the master shall not bee charged wth it, vnlesse it come to his vse, and that by his assent; And the same law is if the seruaunt make a contract in his masters name, the contract shal not binde his master, vnles it were by his masters commaundement, or that it came to the masters vse by his assent. But if a man send his seruant to a faire or market, to buy for him certayne things, though he commaund him not to buy them of no man in certayne, and the seruant doth according, the master shalbe charged, but if the seruaunt in that case buy them in his owne name, not speaking of his Master, the Master shall not be charged, vnles the things bought come to his vse.

Also if a man send his seruant to the market with a thing which he knoweth to be defectiue to be solde to a certayne man, and hee selleth it to him: there an action lieth against the master, but if the Master biddeth him not sell it to any person in certayne, but generally to whom hee can, and he selleth it according, there lieth no action of deceit against the master.

Also if the seruaunt keepe the Masters fire negligently, wherby his masters house is burnt and his neighbours also, there an action lieth against

The 42. Chapter.

against the Master. But if the seruante beare fire negligently in the strette, and thereby the house of an other is burned, there lyeth no action against the Master.

Also if a man desire to lodge with one, that is no common hosteler, and one that is seruāt to him that he lodgeth with, robbeth his chamber, his Master shall not bee charged for that robbing, but if he had been a common hosteler he should haue him charged.

Also if a man be gardene of a prison where in is a man that is condemned in a certayne summe of money, and an other that is in prison for felony, and a seruante of the gardene that hath the rule of the prison vnder him, wilfully lettereth them both escape, in this case the gardene shall aunswere for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the seruante onely shall be put to aunswere to the felony, for the wilful escape.

Also if a man make an other his general receiuer, and that receiuer receiue money of a creditour of his Master, and maketh him acquitaunce, and after payeth not his Master, yet that payment dischargeth the creditour, but if the creditour had taken an acquitaunce of him without paying him his money, that acquitaunce onely were no barre to the Master, vnlesse he made him receiuer by wytyng, and gaue him authorite to make acquitaunces, and then the authorite must bee shewed. And if the creditour in such case by agreement betwene the receiuer and him, deliuered to the
receiuer

receiuer a hoise or an other thing in recompence of the debt, that deliuey dischargeith not the creditour, vnlesse it be deliuered ouer vnto the Maister, and hee agree to it. For the receiuer hath no such power to make no such commutation, but his Maister giue him special commandement thereto.

Also if a seruauit thewe a Creditour of his master, that his master sent him for his money, and hee payeth it vnto him, that payment dischargeith him not, if the master did not send him for it indeed, except that it come after vnto the vse of the master by his assent.

Also if a man make a bailife of a manor, and after the Lord of whom the Manor is holden grant the seignioy to an other, and the bailife after payeth the rent to the graunter, that payment of the rent counteruailleth no attournement though it were by fine, ne shall not binde his Maister, till he attourne himselfe, but if the Lord of whom the land is holden disseised one of the seignioy, and the bailife payeth the rent to the heire of the Lord, that is a good seisin to the heir, though the bailife had no commandement of his Maister to pay it. For it belongeth to his office to pay rentes seruike, but not rent charge as some men say.

Also an encroachment by the bailife shall not bind the master in auowp, if he had no commandement of the master to pay it. Also if there be Lord, mesne, and tenant, & the tenaunt holdeth of the mesne as of his manor of D. the mesne maketh a bailife, and after the tenant maketh a seffement, the seffee ten deth notice to the bailife

S ij.

and

The 43. Chapter.

and hee excepteth his rent with the arrerages, this notice shall not bind the Lord, ne compell him to alter his auowry, for the office of a bayliffe stretcheth not thereto, but hee must haue therein a speciall commaundement of his Master. Also if a seruant ride on his masters horse to doe an errant for his Master into a Towne that hath authoritie to make attachmentes of goods vpon plaintes of debt &c. & thereupon a plaint of debt made against the seruant, the Masters horse is attached by the officers, thinking that the horse were his owne, and because the seruant appeareth not, the officers seise the horse as foresaid, in this case the Lord shall haue an action of trespass against the officers, & this attachment for the debt of his seruant, shall not bind him &c. but that an host or keeper of a Tauerne shalbe charged for their guests, vncles it be done by their assent or commaundement, I doe not remember that I haue read it in the lawes of England.

¶ Whether a villaine, or a bondman may
giue away his goods.

Cap. 43.

It appeareth in the said summe, called Summa Angelica in the tytle Donatia prima the 9. Paragraphe, that a bondman, nor a religious man, a Monke, ne such other that hath nothing in proper, may not giue, but it bee by license of their superiour, but that saying is not as it is said

said there, to bee vnderstood of Religious persons that haue lawfull ministracion of goods, for if they giue with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the ppelete with the counsaile of the moze part of the Couent abide at schoole or go on pilgrimage: they may giue as other honest scholers and pilgrims be reasonably wont to doe, and they may also giue almes where there is great neede, if they haue no time to aske licence.

Also if they see one in extreame necessity they may giue a lmes though their superiours prohibit them, for then all thinges be in common by the law of God. And therfore they be bound for to doe it, as appeareth in the aforesaid summe called Summa Angelica in the title Eleemosina, the 6. Paragrafe. Doth not the Lawe of England agree with these diuersities? Stu. For as much as the question is onely made whether a villaine or a bondman may giue away his goods or not: And it seemeth that after the aforesaid summe, in the title which thou hast before rehearsed, that he ne none other that hath no property may not giue, wherby it appeareth that the saide Summe taketh it that a bondman should haue no property in his goodes, & that therefore his gift should be voyde. I shall somewhat touch what proprietie and what authority a villaine hath in his goodes after the Lawe of the Realme, and what authority the Lord hath ouer them. And I will leaue the diuersities that thou hast remembred before of Religious persons to them that list to treat

¶ iii.

fur-

The 43. Chapter.

further therein hereafter.

First if a Villaine haue goodes eyther by his owne proper buying and selling, or others wise by the gift of other men, hee hath as persone a property, and also as whole interest in them, and may as lawfullye giue them away as any free man may. But if the Lorde seise them befoze his gift: then they bec the Lordes, and the interest of the villaine therein is determined.

Also if the Lorde seise part of the goodes of his villaine in the name of all the goodes that the villaine hath or shall heereafter haue, that seisure is good, for all the goodes that hee had at the time of the seisure. But if goodes come to the villaine after the seisure, he may lawfully giue them away notwithstanding the sayde seisure.

Also if the Lord claime all the goods of the villaine, and seiseth no part of them, that seisure is hold, and the gift of the villaine is good notwithstanding that seisure.

Also if a man bee bound to a villaine in an obligation in a certaine summe of money, & the Lord seiseth the obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the villaine, and therefore if the villaine release the debt, the Lord is barred by that release.

Also if a woman be a niefe, and shee marieth a free man, the goods immediatly by the marriage be the husbandes, and the Lord shal come too late to make any seisure, and if the husband in that case maketh his wife his Executrix
and

and dieth, and the wife taketh the same goods againe as executrix to her husband, yet it shall not bee lawfull for the Lord to take them from her, though she be a neiſe as she was before the marriage.

Also if goods be giuen to a man to the vse of a villaine, and the Lord seiseeth those goods, & seisure after some men is good by the Statute made in the 19. yere of king Henry the 7. where by it is enacted that the Lord shall enter into landes wherof other persons bee seised to & vse of his villaine, and they say that the same Statute shall be vnderstood by equity of goods in vse, as well as of lands in vse.

Also if a villaine be made a Priest, yet neuertheless the Lord may seise his goods & landes as he might before. And until the seiser he may alien them and giue them away as hee might before he was priest. And in this case the Lord may order him, so that he shall do him such seruice as belongeth to a Priest to doe, before any other, but he may not put him to no labour nor other busines, but that is honest and lawfull for a Priest to doe.

Also if a villaine enter into Religion in his yere of prooffe, he may dispose his goods as hee might haue done before the took the habite vpon him.

And in likewise the lord may seise his goods as hee might haue done before, but if hee after make executors, and bee professed, and the executors take the goodes to the perfourmance of the will, then the Lord may not seise the goods though the executors haue them to the perfor-

¶ *titl.*

mance

The 44. Chapter.

mance of the will of him that is his villein, nor in that case the Lord may not seise his body ne put him to no maner of laboꝝ, but must suffer him to abide in his religion vnder the obedience of his superiour as other religious persons doe that be not bondmen: And the Lord hath no remedy in that case foꝝ losse of his bondman, but onely to take an action of Trespasse against him that receiued him into Religion without his licence, and thereupon to recouer damages as shall be assessed by iiii. men. Many other cases there be concerning the gift of the goods of a villeine, wherfoze I shal speake no moze at this time, foꝝ this that I haue said sufficeth to shew that the knowledge of the kings law is right expedient to the good order of conscience concerning such goods.

¶ If a Clarke bee promoted to the tytle of his patrimony, and after selleth his patrimony and after falleth to pouerty, whether shall he haue his tytle therein or not.

Cap. 44.

In the said summe called Rosella, in the title Clericus quartus, the 24. article, it is asked if a Clerke be promoted to the tytle of his patrimony, whether hee may alien it at his pleasure, & whether in that alienatiō the solemnity needeth to be kept that is to bee kept in alienations

nations of things of the church, and it is auns-
 swered there that it may not bee aliened no
 moze then the goods of a spirituall benefice, if
 it be accepted for a title, and expresse assigned
 vnto him, so that it shold goe as into a thing
 of the church, except hee haue after an other be-
 nefice whereof he may liue. But if it bee secretly
 assigned to his title, some agree it may bee
 aliened, and in this case by the Lawes of the
 Realme, it may be lawfully aliened whether it
 bee secretly or openly assigned to his title, for
 the Ordinaries ne yet the partie himselfe after
 the olde custome of the Realme, haue no au-
 thority to bind any inheritance by authoritie
 of the Spirituall Law, and therefore the land
 after it is assigned and accepted to be his title,
 standeth in the same selfe case to bee bought,
 solde, charged, or put in execution, as it did be-
 fore. And therefore it is somewhat to be mar-
 uailed that Ordinaries will admit such lande
 for a title, to the intent that hee that is promo-
 ted should not fall to extreame pouertie, or goe
 openly a begging, without knowing how the
 common law wil serue therein, for of mere right
 all inheritances within this Realme ought to
 be ordered by the kings laws, and inheritance
 cannot bee bound in this Realme but by fine,
 or some other matter of record, or by feoffment
 or such other, or at least by a bargain that cha-
 geth an vse. And ouer that to assigne a state for
 terme of life to him that hath a fee simple be-
 fore, is void in the Lawes of Englande, with-
 out it be by such a matter that it worke by way
 of conclusion or stoppel, and in this case is no
 such

The 44. Chapter.

such maner of conclusion, and therefore al that
 is done in such case in assignring of the sayd ty-
 tle is void. Also there is no interest that a man
 hath in any manor, landes, or tenementes for
 terme of life, for term of yerres, or otherwise, but
 that he by the law of the realme may put away
 his right therin if he will. And then when this
 man alieneth his lande generallie, it were a-
 gainst the law of the Realme that any interest
 of such a tittle should remaine in him against
 his owne sale, and there is no diuersitie, whe-
 ther the assignement of the tittle were open or
 secret, and so the tittle is hopde to all intents.
 And in likewise if a house of Religion or any
 other spirituall man that hath graunted a tittle
 after the custome vled in such tittles, sell all the
 landes and goods that they haue, that sale in
 laws of England is good as against the tittle,
 and the buyer shall neuer be put to answer to
 the tittle. Also some say that vpon the common
 tittles that be made daily in such case, that if he
 fall to pouerty that hath the tittle, he is without
 remedy, for they be so made that at the common
 Lawe there is no remedy for them, and if hee
 take a suite in the spirituall Court, many men
 say that a Prohibition or a Præmunire lyeth.
 And therefore it were good for Ordinaries in
 such case to counsaile with them that bee lear-
 ned in the Lawe of the Realme to haue such a
 forme deuised for making of such tittles, that if
 need bee, would serue them that they bee made
 vnto, or els let them be promoted without any
 tittle, and to trust in God that if they serue him
 as they ought to doe, hee will prouide for them
 to

to haue sufficient for them to liue vpon. And beside these cases that I haue remembred before, there be many other cases put in the sayde summes for the well ordering of conscience, that as me thinketh are not to bee obserued in this Realme, neither in law nor conscience.

Do. Dost thou then thinke that there was defaulte in them that drew the sayde summes and put therein such cases and such solutions that as thou thinkest hurt conscience, rather then to giue any light to it, specially as in this Realme. Stu. I thinke no default in them, but I thinke that they were right well and charitably occupied to take so great paine and laboz as they did therein, for the wealth of the people and cleering of their conscience, for they haue thereby given a right great light in conscience to all Countries where the law Etuill and the Lawe Cannon bee vsed to temporall things. But as for the Lawes of this Realme they knew them not, ne they were not bounde to know them, and if they had knowen them, it would little haue holpen them for h countries that they most specially made they treatises for: And in this countrey also they be right necessary and much profitable to all men for such doubtes as ryle in conscience in diuers other maners not concerning the law of the realme. And I maruell greatly that none of them that in this Realme are most bounden to doe that in them is to keep the people in a right iudgement, and in a cleerenesse of conscience, haue done no moze in time passed to haue the Lawes of the Realme knowen then they haue done, for

The 44. Chapter.

for though ignorance may sometime excuse, yet the knowledge of the truth, and the true iudgment is much better, & sometime though ignorance excuseth in part, it excuseth not in all, and therefore mee thinketh they did very well if they would yet bee callers on to haue that point reformed as shortly as they could. And now because thou hast well satisfied my minde in many of these questions that I haue made, I purpose for this time to make an end. Do, I pray thee yet shew me, that thou make an ende mo of these cases, that after thine opinion be set in diuers books of learning of conscience, that as thou thinkest for lacke of knowledge of the Law of the Realme, doe rather blinde conscience, then giue a light vnto it, for if it be so, the surely as thou hast said it would bee reformed, for I thinke verily the Lawes of the Realme in many cases must in this Realme bee obserued as well in conscience, as in the iudiciall Courts of the Realme. S. I wil with good wil shew to thee shortly some other questions that bee made in the sayd summe to giue thee an other occasion to see therein the opinions of the said summes, and to see farther thereupon howe the opinions and the Lawes of the Realme do agree together. And yet best be these questions that I intend to shew vnto thee, there be many other questions of the sayde summe that had as great neede to bee moze plainly declared according to the Lawes of the Realme, as those that I shall shew thee hereafter, or as I haue spoken of befoze, but to the cases that I shal speake of hereafter I will shew thee nothing

thing of my conceipt in them, but will leaue it to other that will of charite take some further paine hereafter in that behalfe.

¶ Diuers questions taken out of the Student of the summes, called Summa Rosella, & Summa Angelica, which thinketh necessary to be looked vpon, and to be seene how they stand and agree with the Law of the Realme.

Cap. 45.

The first questiō is this, whether a custom may breake a law positius. Summa Rosella, titulo Consuetudo Parag. 13.

The second is if a man attainted or banished be restozed by the Prince, whether shal that restitution stretch to the goods, Summa Rosella in the title Damnatus in principio.

Item if a man be outlawed of felony, abjured or attainted of murther, or felony, or he that is an Ascismus may be slaine by strangers, and see like matter therto, Summa Angel. in the title Ascismus Para. 11.

This question is somewhat answered to, in a newe addition, as appeareth before in the 41. Chapter.

Item whether the master shall be bound by the act, for offence of his seruitt, or officer, Summa Ro-

The 45. Chapter.

Angel. in the title Dominus, para. 4.

This question is answered to in an addition, as appeareth before in the xlii. Chapter.

Item whether a hillaine may giue away his goods, Summa Angelica, in the title Donatio prima, para. 9.

This question is answered to in an additio as appeareth before in the 43. Chap.

Item whether an Abbot may giue &c. Summa Angelica, in the title Donatio 1. Para. 10. & 39.

Item whether a woman couert may giue away any goods. And it is answered. Summa Angelica, in the title Donatio 1. Para. 11. that shee may not, without shee haue goods beside her dowry, but onely in almes.

Item if a mā do treason, whether his gift of goods after, before attainder be good. Summa Angelica, in the title donatio 1. par. 12. & it seemeth there nay, and looke Summa Angelica, in the title Alienatio, Par. 24.

Item if a man wittingly make a contracte betwene two kinnsolke, or other that may not lawfully marry together, whether he hath forsaith his goods. Summa Ang. in the title Donatio 1. Par. 14.

Item whether the father may giue to the son Summa Ang. in the title donatio 1. Par. 19. and Summa Rosella, in the title Donatio 2. Par. 42.

Item whether a man may giue aboue v. C. s. absque insinuatione, Summa Angel. in the title Donatio 1. Para. 20.

Item whether a gift shal bee auoyded by an
in

ingratitude. Summa Rosella, in the title Donatio 1. Parag. 17. & 29. and there it is said \bar{p} the gift is void by the law of nature, & looke Summa Angelica, in the title Donatio prima, Paragrafe 42. & 45.

Item where any gift betwene the husband and the wife may be good, and it is sayd yea, when the husband giueth it, Causa remunerationis. Summa Rosella, in the title Donatio 1. Para. 32.

Item if a man make a will, and enter into religion, whether hee may after reuoke the will, and it is sayde, that friers Minor may not, and other may. Summa Rosella, in the title Donatio 1. para. 35. in fine.

Item if a man giue an other a towne with all the rights that he hath in the same, whether the patronage &c. and the tythes &c. Summa Rosella in the title Ecclesia 1. Parag. 56.

Item whether all that is bought with the money of the Church be the churches, Summa Rosella, in the title Ecclesia 1. Para. 7.

Item if a gift made to a Monastery may be auoyded by that the giuer hath children after the gift, Summa Rosella, in the title Donatio 1. par. 43.

Item if a man buy a thing vnder the halfe price, whether he be bound by the Lawe to restore &c. Summa Rosella, in the title Emptio & venditio, para. 6.

Item whether a common theefe, vel comunis depopulator agrorum may abjure, Summa Rosella, in the title Emunitas 2. in principio, Et habetur

The 25. Chapter.

betur ibi in fine qd' licet leges excipiant plures personas tum per ius canonicum legibus derogatum est.

Item whether a man shall take the Church for great enormous offences that is not murder, nor felony. Summa Rosella, in the title Emunitas 2. Parag. 3. 11.

Item if a man take one in the high way, and draw him out, & there beate him, whether hee shall haue the punishment that is ordained for them that strike one in the high way. Summa Rosella, in the title Emunitas 2. Para. 6.

Item whether hee that taketh the Church may after the offence be iudged to death. Summa Rosell, in the title Emunitas 2. para. 8.

Ite whether the Bishops palleis be sanctuaries Summa Rosella, in the title Emunitas par. 24.

Item whether the dignity of the Bishop, or Priesthood discharge bondage. Summa Rosella, in the title Episcopus in principio.

Item whether a Clarke is bound to pay any Impositions, or Tallages, for his patrimony, or otherwise. Summa Rosella, in the title Excommunicatio 1. diuisione oct. para. 4. & 5. & 6. & diuisione nona, para. 1.

Item if it were ordained by Statute, that if a man sell &c. he shall giue to the king if. d. whether a Clark be bound to giue it if he sel of his prebend. Summa Rosella, in the title Excommunicatio 1. diuisione nona, para. 3.

Item if it be ordained by Statute, that there shall not be laied vpon a dead person, but such a certaine cloth, or thus many tapers, or candles

deis whether the statute be good & it is left for a question. Summa Rosella in the title Excommunicatio 1. diuisione 18. par. 8. in Fine.

Item if a man make a lease of a Mill for term of yerres, & it is agreed that the lessee shal grind the lessoz tolle free during the terme, after the lessoz is made a earle or a duke, & hath greater household the before, whether the lessee be bound there &c. Summa Rosell. in the title Familia, Pa. 5.

Item if a master will not pay his seruantes wages that hath serued him faithfully, whether that the seruant may take secretly asmuch goods of the masters &c. & if he do whether hee be bound to restitution. Summa Rosella, in the title Familia, par. 6.

Item things immouable of the church may not be giuen. Summa Rosella, in the title Feodú, Parag. 1. And see there in principio what Feodum is.

Item whether the sons bastards, & the sons lawfully begotten shal inherite together. Summa Rosella, in the title filius, par. 1.

Item whether father and mother may succeed to their bastards. Summa Rosella, in the title filius. para. 4.

Item whether the father may leaue any of his goods to his bastards. Summa Rosella, in the title Filius, para. 5. And Summa Rosella, in the title Societas, para. 23.

Item whether the offence of the father shal hurt the sonne in temporall thinges. Summa Rosella, in the title Filius.

Item if a man giue al his lands and goods to his childre, whether a bastard shal haue any part

The 45. Chapter.

part Summa Rosella, in the title filius Para. 32.

Item to whom treasoꝝ found belongeth Súma Rosella, in the title furtum, Par. 11.

Item if a deere, oꝝ other wilde beast that is so soꝛe hurt ꝛ he may be taken, cōmeth into an other mans ground, whether it be his that owne the ground, oꝝ his that strake him, Summa Rosella in the title furtum, Para. 13.

Item whether theft be in a litle thing aswel as in a great thing, Summa Rosella, in the title furtum, Parag. 18.

Item what pain a theefe shall haue, Summa Rosella in the title furtum, Para. 22.

Item that if goodes of dead men goe to the heires, & that of dammed men, s. De terris. Summa Rosella, in the title Hereditas, para. 1.

Item whether a man shall be sayd guiltie of murder by commandement, counsell, oꝝ assent, Summa Rosella in the title Homicidium 3. per totum, & like matter is Homicidium 4. in principio, and in diuers other cases.

Item a man maketh a pꝛiup contract with a woman, & after hath a child by her, & after marieth an other woman, and hath a child, she not knowing the first contract, which of the children shal be his heire. Summa Rosella in the title Illegitimus, Parag. 4.

Item whether the Pope may legitmate one to temporall things, & to succeed, Súma Rosella in the title Illegitimus Para.

Item if goods be found that were left of the owner as forsaken, who hath right to them. Súma Rosella, in the title Inuenta para. 3. And looke Súma Rosella in the title furtum, para. 17.

And

And thus I make an end of these questions, & because thou desirest me in the xxxi. Chapter to shew thee somewhat where ignorance excuseth in the Law of the realme and where not, I wil answer somewhat to the question, and so commit thee to God.

¶ Where ignorance of the Law excuseth in the lawes of Eng'land, and where not.

Cap. 46.

Ignorance in the law though it be inutncible doth not excuse as to \bar{h} law but in few cases, for every man is bound at his perill to take knowledge what \bar{h} law of the realm is, aswel \bar{h} law made by statute as the cōmon law, but ignorance of \bar{h} deed, which may bee called the ignorance of the truth of the deed, may excuse in many cases. Do. I put case that a statute penal be made, and it is enacted that the statute shalbe proclaimed by such a day in every shire, & it is not proclaimed before the day, & after the day a man offended against the statute, shall bee run in \bar{h} penalty? S. I thinke yea, if there be no farther wordes in the statute to help him, that is to say, \bar{h} if the proclamation bee not made that no mā shalbe bound by the statute, & \bar{h} cause is this, there is no statute made in this Realme, but by the assent of the Lords spiritual & tēporal, & of al the cōmons, that is to say, by the knights of the shire, citizens, and burgessees that be chosen by assent of the commons, which in the Parliament represent the estate of the whole cōmons;

¶

And

The 46. Chapter.

And every Statute there made, is of as strong effect in the Lawe, as if all the commons were there present personally at the making thereof, and like as there needed no proclamation, if all were there present in their owne person, so the law presumeth there needeth no proclamation, when it is made by their authoritie, & then when it is enacted that it shall be proclaimed &c. that is but of the favours of the makers of the Statute, & not of necessity, and it cannot therefore be taken, that their intent was that it should be void if it were not proclaimed. Nevertheless some be of opinion that if a man before the day appointed for the proclamation offend the Statute that he should not in that case be punished, for they say that the intent of the makers of the Statute shall be taken to be, that none should be punished before the day, which is a doubt to some other; But admit it be as they say, that he shall be excused, yet he is not excused by the ignorance of the Lawe, but because the intent of the makers excuseth him. D. It is enacted in the 7. yeere of R. 2. cap. 6. that every Shireffe shall proclaim the Statute of Winchester three times every yeere, in every market towne, to the intent the offenders shall not be excused by ignorance, & it seemeth by those wordes that if no Proclamation be made, that the offenders may be excused by ignorance. S. Some take the intent of that Statute to be, that the people by that Proclamation should have knowledge of the Statute of Winchester, to the intent that the forfeiture therein may be taken aswell in conscience as in law, and some take the Statute to be of

of such effect as thou speakest of, that is to say, that no forfature should grow upon the Statute of Winchester against them that were ignorant, but proclamation were made according to the said Statute of Richard. And if it be so taken, the Statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: but admit it be as they say, then they that be ignorant be excused by that said particuler estatute, specially made in that case, and not by the general rules of the law, and sometime in diuers Statutes Penals they that be ignorant be excused by the selfe Statute, as it is upon the Statute of Richard the 2. the 13. pere, the 2. Statute, and the last Chap. where it is enacted, that if any person take a benefice by prouision that he shalbe banished that Realm & forfett all his goods, and that if he be in the realme he auoid within vi. weekes after he hath accepted it, and that none shall receiue him that is so banished after the said 6. weekes upon like forfature if he haue knowledge, and so he that hath no knowledge is excused by that expresse wordes of the Statute. And in likewise hee that offendeth against Mag. cha. is not excused but he haue knowledge that it is prohibited that hee doth. for they be onely excommunicated by sentence called *Sententia lata super cartas*, that doth it willingly, or that doth it by ignorance, & correct not themselves within xii. dayes after they haue warning. And sometime they that be ignorant of a Statute be excused from the penalty of the Statute because it shal be taken that the intent of the makers of the Sta-

T. iii.

tute

The 46. Chapter.

tute was that none should bee bounde but they that haue knowledge, but that any man shal be discharged in the law by ignorance of the lawe only for that he is ignorant, I knowe few cases except it might be applied to infants that be in their infancy & within yeres of discretion, for if ignorance of the law should excuse in the lawe, many offenders would pretend ignorance. Do. Shall an infant that hath discretion & knoweth good fro euill be punished by a penal Statute that he is ignorant in? S. If the Statute be that for the offence hee should haue corporall paine, I thinke he shalbe excused and haue no corporall paine, but I suppose that that is not for the ignorance, for though he knew the Statute & willingly offended, yet I thinke he shal haue no corporall paine; As where he pleade Joyn-tenancy by deed that is found against him, or if he pleade a Record in Wille and faileth of it at his day, but that is because the lawe presumeth that it was not the intent of the makers of the Statute that hee should haue that punishment, but if he be of yeres of discretion to know good from euill, whether he shall then forsaite the penalty of a penall Statute it is moze doute, for it is commonly holden, that if an infant had not bin excepted in the Statute of foreiudgment, that the foreiudgment should haue bound him, & so shall his cesser, & his leuying of a crosse against the Statute, or if he be a gardain of a prison and suffer a prisoner escape, he shall pay the debt because the Statutes be generall, & if he should by the Statutes be bound wthin age, like reason will & he may by a Statute penall leese his goods. D.

If

If an infant doe a murder or a felony at such
 peres as he hath discretion to know the Law,
 shal he not haue the punishment of the lawe as
 one of full age? S. I think yes, but that is by an
 old Maxime of the law for eschewing of mur-
 ders a felonies, & so it is of a trespass, but these
 cases run not vpon the ground of ignorance, but
 with what acts infants shal be punishable or
 not punishable for the tendernes of theyr age,
 though they be not ignorant? D. Bee not yet
 Knighes & noble mē that are bound most pro-
 perly to set their studie to actes of chivalry for
 defence of the realme, & husbandmen that must
 vse tillage & husbandry for the sustenance of the
 commonalty, & that may not by reason of theyr
 laboꝝ put themselves to know the law, be dis-
 charged by ignorance of the law? S. No verely,
 for sth all were makers of the Statute, the lawe
 presumeth that al haue knowledge of that that
 they make as it is said befoꝛe: and as they bee
 bound at their perill to take knowledge of the
 Statute that they make: so be al them that come
 after thē. And as for Knighes & other nobles
 of the realme, mee seemeth that they shoulde bee
 bound to take knowledge of the law aswell as
 any other withyn the Realm, except them that
 giue themselves to the studie & exercise of the
 law, & except spirituall iudges & in many cases
 be bound to take knowledge of the lawe of the
 realm as is said befoꝛe in Cap. 25. for though
 they be bound to actes of chivalry, for the de-
 fence of the Realm, yet they bee bound also to
 the actes of Justice, & that it seemeth moze then
 other be by reaso of their great possessions and

¶ iii.

author

The 46. Chapter.

authoritie. And for the well ordering of the tenants seruantes & neighbors, that many times haue need of their helpe, & also because they bee oft called to be of the Kings counsell, & to be general counsailes of the realm, wher their counsel is right expedient & necessary for the cōmon wealth, and therefore if the noble men of this realme would see their children brought vp in such maner, that they should haue learning and knowledge, moze then they haue cōmonly vsed to haue in time past, specially of the grounds & principles of the law of the realm wherin they bee inherite, though they had not the high cunning of the whole body of the law, but after such maner as M. Foitescue in his booke that he entitlith the booke de laudibus legū Angliæ, aduertiseth the Prince to haue knowledge of the lawes of this realme, I suppose it would bee a great help hereafter to the ministration of Justice of this realme, a great suerty for himselfe, and a right great gladnes to all the people: for certaine it is, the moze part of the people would moze gladly heare the rulers & gouernors intended to order them with wisdom and Justice, then with power and great retinues. But ignorance of the deepe many times excuseth in the lawes of England, & I shall shortly touch some cases therof to shew where it shall excuse, and where it shall not excuse, & then the reader may adde to it after his pleasure & as hee shall thinke to be conuenient.

¶ Certaine cases & grounds where ignorance of the deed excuseth in the lawes of England, and where not.

Cap.

Cap. 47.

If a man buy a hoxie in open market of him that in right hath no proprietie in him, not knowing but that he hath right, he hath good title and right to the hoxse, and the ignorance shall excuse him. But if hee had bought him out of the open market, or if hee had knowen that the seller had no right, the buying in open market had not excused him. Also if a man retaine an other mans seruant not knowing that hee is retained with him, the ignorance excuseth him both of the offence that was at Common Lawe against the Maxime that prohibited such retaining of an other mans seruant. And also against the Statute 33. Ed. 3. wherby it is prohibite vpon pain of imprisonment that none shall retayne no seruant that departeth within his terme without licence or reasonable cause, for it hath been alway taken, that the intent of the makers of the sayd Statute was that they that were ignorant of the first retainer should not run in any penalty of the Statute. And the same Lawe is of him that retaineth one that is ward to an other, not knowing that he is his ward. And if homage be due and the ternaunt after that the homage is due maketh a feoffement, and after the Lord not knowing of the feoffement distraineth for the homage, in that case that ignorance shall excuse him of his damages in a repleuin though he cannot auow for the homage: but if he had knowen of the feoffement, he should haue paid damages for the wrongfull taking. Also if a man be bound in an Obligation that he shall

repaire

The 47. Chapter.

repaire the houses of him that hee is bound to by such a certaine time, as oft as need shall require, & after the houses haue need to bee repaired, but he that is bound knoweth it not, that ignorance shall not excuse him, for he hath bound himselfe to it, and so hee must take knowledge at his perill: But if the condition had bin that he should repaire such houses as hee to whom he was bound should assigne, & after he assigneth certain houses to be repaired, but he that is bound hath no knowledge of that assignmēt, that ignorance shall excuse him in the Law, for he hath not bound himselfe to no reparation in certain, but to such as the party will assigne, & if he assigne none, he is bound to none, & therefore sith hee that should make the assignement is priuy to the deed, he is bound to giue notice of his own assignement: but if the assignement had bin appointed to a stranger, then the obligor must haue taken knowledge of the assignement at his perill. Also if a man buy landes whereunto an other hath title which the buyer knoweth not, that ignorance excuseth him not in the law no more then it doth of goods. Also if a seruant come with his Masters horse to a Towne that by custome may attach goods for debt, & vpon a plaint against the seruant, an officer of the towne by information of the partie attacheth the Masters horse, thinking that it were the seruantes horse, that ignorance excuseth him not, for when a man will do an act, as to enter into land, seise goods, take a distresse, or such other he must by the Law at his perill see that that hee doth bee lawfully done, as in
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the case before rehearsed. And in likewise if a Sherriffe by a Replewin deliuer other beastes then were distrained, though the party that distrained shewe him they were the same beastes yet an action of trespass lyeth against him, and ignorance shall not excuse him, for he shall bee compelled by the law as all officers commonly be, to execute the Kinges writ at his perill, according to the tenor of it, and to see that the act that he doth be lawfully done. But otherwise it is after some men if vpon a Summons in a Praecipe quod reddat the Sherriffe by information of the demandant summoneth the tenant in an other mans lands, thinking it for the tenants land, there they say he shalbe excused, for in that case hee doth not seise the land ne take possession in the land, but only doth summon the tenant vpon the land, & the writ commaundeth him not that hee shall summon the tenant vpon his owne land, but generally that hee shall summon him, & knoweth not in what land, & then by an old Maxime in the Law it is taken that hee shall summon him vpon the land in demand, and therefore though he mislake the land & bee ignoraunt of it, yet if the demandant informe him that that is the land that hee demandaeth, that sufficeth to the Sherriffe as to his entry for the summoning as they say, though it bee not the tenants; And here I make an end of these questions for this time. Do. I pray thee yet or we depart take a little more paine at my desire. S. What is that? D. That then wouldst shewe me the mind in diuers cases of the lawe of the realme which as me seemeth stand not so cleerly with

The 48. Chapter.

with conscience as they should doe. And therefore I would gladly heare thy conceipt therein how they may stand with conscience. S. But the cases and I shall with good will say as I thinke to them.

¶ The first question of the Doctor; how the law of England may be said reasonable that prohibith them that bee arraigned vpon an Indictment of felony or murther to haue counsaile.

Cap. 48.

Me thinketh that the law in that point is very good & indifferent, taking the law therein as it is. D. Why, what is the law in this point? S. The law is as thou sayst, that he that haue no counsaile, but then the Law is farther, that in all things that pertaine to the order of pleading, the Judges shall so instruct him and order him, that he shall runne into no ieopardy by his mispleading: As if he wil plede that he neuer knew the man that was slaine, or that he had neuer a peny worth of h goods that is supposed that he should steale in these cases the Judges are bounde in conscience to informe him that he must take the generall issue and pleade that hee is not guiltie, for though they be set to be indifferent betweene the King and the partie as to the partie, and to the principall matter, as they bee in all other matters, yet they bee in this case to see that the partie take no hurt in forme of pleading in such matters,

ters, as he shall shew to be the truth of the matter, and that is a great fauour of the law, for in appeale, though the Iustices of fauor wil most commonly helpe forth the partie, and sometime his Counsell also in the forme of pleading, as they do also many times in common pless, yet they might in those cases if they would bid the partie, and his counsaile pleade at their perill. But they may not doe so with conscience vpon indictments as me seemeth: for it were a great vnrasonableness in the law, if it should prohibite him that standeth in ieopardie of his life that he should haue no counsaile, & then to dyne him to plead after the straitte rules, and formalities of the law that hee knoweth not. D. But what if he bee knowne for a common offender, or that the Iudges know by examination, or by an euident presumption that he is guilty, & he asketh Sanctuary, or pleadeth misnomer, or hath some Recoꝛde to plead, that hee cannot pleade after the fourme: May not the Iudges in such cases bid him pleade at his perill? Sr. I suppose they may not. for though he bee a common offender, or that he be guilty, yet he ought to haue that the Lawe giueth him, and that hee shal haue the effect of his piers, and of his matters entred after the fourme of the Lawe, and also sometime a man by examination, and by witnesse may appeare guilty that is not. And in likewise there may bee a beheement suspition on that he is guilty, and yet hee is not guiltie, and therefore for such suspition, or beheement presumptions me thinke a mā may not with conscience bee put from that he ought to haue
by

The 48. Chapter.

by h lawe, ne yet although the iudges knowe it
of their owne knowledge: but if it were in ap-
peale I suppose that the Iudges might doe
therein as they should thinke best to be done in
conscience, for there is no Lawe that bindeth
them to instruct him (but as they doe common-
ly to the parties of fauour in al other cases) but
they may if they will bid them pleade at theyr
perill by aduise of their counsaile, and if the ap-
pellee be pooze, & haue no counsell, h court must
assigne him counsaile if he aske it, as they must
doe in all other places, & that me thinketh they
are bound to doe in Conscience though the ap-
pellee were neuer so great an offender, & though
the Iudges knew neuer so certainly that hee
were guilty, for the law bindeth them to doe it.
And so me thinketh that there is great diuersi-
tie between an indictment and an appeal. And
the reason why the Law prohibiteth not coun-
saile in appeale as it doth in an indictment, I
suppose is this; There is no appeale brought,
but that of common presumption the appellant
hath great malice against the appellee. As
when the appeale is brought by the wife of
the death of her husband, or by the sonne of the
death of his father, or that an appeale of robs-
berie is brought for stealing of goodes. And
therefore if the Iudges should in those cases
shew themselves to instruct the appealers, h ap-
pellants would grutch & thinke them partiall,
and therefore as well for the indemnity of the
court, as of the appellee in case that hee be not
guiltie, the Law suffereth the appellee to haue
counsell, but when that a man is indicted at the
Kings

Kings suit, & King intendeth nothing but iustice with fauor, and that is to the rest & quietness of his faithfull subiects, & to put away misdoers among them charitably, and therfore he will be contented that his Iustices shall helpe forth the offendours according to the truth, as far as reason and iustice may suffer. And as the King wil be contented therein, it is to presume that the counsel wil be contented: And so there is no daunger thereby, neyther to the Court ne to the party, and as I suppose for this reason it began that they should haue no counsaile vpon indictments, & that hath so long continued that it is now grown into a custome, & into a maxime of the law, that they shal none haue. D. But if the Iudges knew of their owne knowledge that the inditree is guilty, and then he pleadeth *Quisnimer*, or a Record that hee was auerfoits arraigned, and acquite of the same murder, or felony, and the Iudges of their owne knowledge know that the plee is vnttrue, may they not then bid him plead at his perill? Sr. I think yes, but if they know of their own knowledge that he were guilty of the murder or felony, but that the plee was vnttrue they knewe not, but by conjecture or information, I think they might not then bid him plead at his perill.

¶ The second question of the Doctor, whether warranty of the younger brother, that is taken as heire, because it is not knownen but that the eldest brother is dead, be in conscience a barre vnto the eldest brother, as it is in the law.

Cap.

The 42. Chapter.

Cap. 49.

A Man seised of lands in fee hath issue two sonnes, the eldest sonne goeth beyond the sea, & because a common voice is that hee is dead, the yonger brother is taken for heire, & father dieth, & yonger brother entreteth as heire, & alieneth the land with a warrant, and dieth without any heire of his body, and after the elder brother commeth againe, and claimeth the land as heire to his father, whether shall hee be barred by that warrant in conscience as he is in the Law? *Sci.* It is a Maxim in the Law, that the eldest brother shall in that case be barred, and that Maxim is taken to bee of as strong effect in the Law, as if it were ordeined by Statute to be a barre. And it is as old a law that such a warrant shall barre the heire, as it is that the inheritance of the father shall only descend to the eldest sonne. And Neth the law so is, why should not then conscience follow the lawe, as well as it doth in that point, that the eldest sonne shall haue the land. *Doct.* For there appeareth no reasonable cause wherrupon the Maxim might haue a lawfull beginning; For what reason is it that the warrantie of an auncestor that hath no right to land, should barre him that hath right? And if it were ordeined by Statute, that one man should haue an other mans land, & no cause is expressed why hee should haue it, in that case though he might hold the land by force of that Statute, yet he could not hold it in conscience, wout there were

were a cause why he should haue it, & these cases bee not like as me seemeth to the forfeit^r of goods by an Outlawry, for I wil agree for this time, that that forfeiture standeth with conscience, because it is ordained for ministrati^on of iustice, but I cannot perceiue any such cause here: and therefore me thinketh that this case is like to the Maxime, that was at the common Law of wrecke of the Sea, that is to say, that if a mans goods had bin wrecked vpon the sea, that the goods should haue bin immediatly forfeited to the King. And it is holden by all Doctors that that law is against Conscience, except in certain cases that were too long to rehearse now. And it was ordained by the Statute of Westminster the 1. that if a Dogge or Cat come alicie to the land, that the owner if he proue the goods within a yeere and a day to be his, shall haue them, whereby the said Law of wreches of the sea, is made more sufferable then it was before, and some thinke in this case that this warranty is no bar in conscience though it be a barre in the law. S. I pray thee keep that case of wrecke of the sea in thy remembraunce, and put it hereafter, as one of thy questions, & thereupon shewe me thy farther minde therein, and I shal with good wil shew thee my mind, & as to this case that we be in now, me thinketh the Maxime whereby the warranty shal be a barre, is good and reasonable, for it seemeth not against reason that a man shalbe bound, as to temporal things, by the acte of his auncester to whom hee is heire, for like as by the lawe it is ordained, that hee shall haue aduantage by

The 49. Chapter.

the same aunceſter, and haue all his landes by diſcent if he haue any right, ſo it ſeemeth that it is not vnreaſonable, though the law for the pꝛiuitie of bloud that is betweene them ſuffer him to haue a diſaduantage by the ſame aunceſter, but if the Maxime were that if any of his aunceſters, though hee were not heire to him made ſuch a warrantie, that it ſhould be a barre, I thinke that maxime were againſt conſcience, for in that caſe there were no grounde, nor conſideration to pꝛoue how the ſaid Maxime ſhould haue a lawfull beginning, wherefoꝛe it were to bee taken as a Maxime againſt the law of reaſon, but me thinketh it is otherwiſe in this caſe, for the reaſon that I haue made befoꝛe. D. If the father bind him and his heirs to the payment of a debt and dye, in that caſe the Sonne ſhall not be bound to pay the debt, vnleſſe he haue aſſets by diſcent from his father. And ſo I would agree, that if this man haue aſſets by diſcent from the aunceſter that made the warrantie, that he ſhould haue bin barred: but els mee thinketh it ſhould ſtand hardly with conſcience, that it ſhould be a barre. S. In that caſe of the obligation, the Law is as thou ſayſt, & the cauſe is for that the Maxime of the law in that caſe is none other, but that hee ſhall bee charged if hee haue aſſets by diſcent, but if the Maxime had bene generall that the heire ſhould bee bound in that caſe without any aſſets, oꝛ if it were ordeined by Statute that it ſhould bee ſo, I thinke that both the Maxime and the Statute ſhould well ſtande with conſcience. And like law is where a man is bound

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as heire, he may enter as he that hath nothing by descent, but where he claime the lande in his owne right, there the warrantie of his auncester shalbe a barre to him, though he haue no assets from the same auncester, & though it be said in Ezechiel Cap. 18. That the sonne shall not beare the wickednesse of the father that is vnderstood spiritually. But as to temporall goods the opinion of Doctors is, that the son sometime may beare the offence of his father. D. Now that I haue heard thy minde in this case, I will take aduise ment therein till a better leasure. And will now proceed to an other question S. I pray thee do as thou sayst, and I shall with good will make aunswere thereto as well as I can.

¶ The 3. question of the Doctour; If a man procure a collaterall warrantie, to extinct a right that he knoweth an other man hath to land, whether it be a bar in conscience as it is in the Law or not.

Cap. 50.

A Man is disseised of certain land, & disseised for seller the land &c. & allience knowing of the disseisin, obtaineth a release with a warrantie of an auncester collateral to & disseisee that knoweth also the right of & disseisee, that auncester collateral dyeth, after whose death the warrantie descendeth vpon the disseisee, whether may the allience in & case hold the land

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The 50. Chapter.

in conscience as he may by the law. S. With the warrantie is descended vpon him, where by hee is barred in the lawe, me thinketh that he shall also be barred in conscience, and that this case is like to the case in the next Cha. before wherein I haue said that as mee thinketh it is a barre in conscience. D. Though it might be taken for a barre in conscience in that case, yet me thinketh in this case it cannot, for in that case the ponger brother entred as heire, knowing none other but that he was heire of right, and after when he sold the land, the buyer knew not but that he that sold it had good right to sell it, and so he was ignorant of the title of the eldest brother, & that ignorance came by the default and absence of himselfe, that was the eldest brother. But in this case aswell the buyer, as he that made the collateral warrantie, knew the right of the disseisee, and did that they could to extinct the right, and so they did as they would not should haue bin done to them, & so it seemeth by hee that hath the land may not with conscience keepe it. Sc. Though it be as thou sayst that al they offended in obtaining of the sayd collateral warrantie, yet such offence is not to be considered in the law, but it be in very speciall cases, for if such alleagings should be accepted in the law, releases, and other writings should be of small effect, and vpon euery light surmise, all writings might come in triall whether they were made with conscience or not. Therefore to auoide that inconuenience, the law will driue the partie to answer onely whether it bee his deede or not, and not whether the deede were made

made with conscience or against conscience, & though the party may bee at a mischief thereby, yet the Law will rather suffer the mischief then the said inconvenience. And like law is if a woman couert for dread of her husband by compulsion of him leuy a fine, yet the woman after her husbands death shall not be admitted to shew that matter in auoiding of the fine for the inconvenience that might followe therupon. And after the opinion of many men, there is no remedy in these cases in the Chancery: for they say that where the common Law in cases concerning inheritaunce putteth the partie from any auerment for eschewing of an inconvenience that might followe of it among the people, that if the same inconvenience should followe in the Chauncerie if the same matter should be pleded there, that no Sub pena should lie in such cases, & so it is in the cases before rehearsed; for as much vexation, delay, costs and expences might grow to the partie if he should be put to answer to such auermentes in the Chancery, as if he were put to answer to the same at the common law, and therefore they thinke that no Sub pena lieth in the said cases ne in other like vnto the. Nevertheless I do not take it that their opinion is that he that bought the land in this case may with good conscience hold the land, because he shall not bee compelled by no law to restore it, but that he is in conscience and by the law of reason bound to restore it, or otherwise to recompence the partie, so as hee shall bee contented, and I suppose verilie it is so if hee will keepe his soule out of perill and

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The 51. Chapter.

danger. And after some men to these cases may bee resembled the case of a fine with nonclaime that is remembred befoze in the 14. Chap. of this booke, where a man knowing an other to haue right to certayne land causeth a fine to be leuted therof with Proclamation & the other suffreth v. peres to passe without claime, in that case hee hath no remedy neyther by common lawe, nor by Sub pena, & that yet he that leuted the fine, is bound to restore the land in conscience. And me thinketh I could right wel agree that it should be so in this case, and that specially, because the party himselfe knoweth perfectly that the saide collaterall warrantie was obtained by couin & against conscience.

¶ The fourth question of the Doctour is of
the wrecke of the Sea.

Cap. 51.

I pray thee let me now heare thy minde how the law of England concerning goods that be wrecked vpon the sea may stand with conscience, for I am in great doubt of it. S. I pray thee let me first heare thine opinion what thou thinkest therein. D. The Statut of West. the 1. that speaketh of wreckes is, that if any man, dogge or catte, come aliue into the land out of the ship or barge, that it shall not be iudged for wrecke, so that if the party to whom the goods belög come within a pere and a day and proue them to be his, that he shall haue the or els that they shal remain to the King. And me thinketh that

that the sayde Statute standeth not with conscience, for there is no lawfull cause why the party ought to forfeit his goods ne that the King or Lords ought to haue the, for there is no cause of forfeiture in the party, but rather a cause of sorrow & heauines; And so the law seemeth to ad sorrow by sorrow: And therefore Doctors hold commonly that he that hath such goods is bound to restitution, and that no custome may help, for they say it is against the commandment of God, Leuit. 19. where it is commanded that a man should loue his neighbor as himselfe, & that they say he doth not, that taketh away his neighbours goodes, but they agree that if any man haue cost and labor for the sauing of such goodes wrecked, speciall for such goodes as would perish if they lay still in the water, as Sugar, Paper, Salt, Meale, and such other, that he ought to be allowed for his costes & labor, but he must restore the goodes except he could not saue them without putting his life in jeopardy for them, & then if he put his life in such jeopardy and the owner by common presumption had had no way to haue saued them, then it is most commonly holden that he may keepe the goods in conscience, but of other goodes he would not so lightly perish, but that the owner might of common presumption saue them himselfe, or that might be saued without any perill of life, the takers of them bee bound to restitution to the owner, whether he come within the yeare or after the yeare.

And me thinketh this case is somewhat like to a case that I shall put, if there were a Law

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The 51. Chapter.

and a custome in this realm or if it were ordeined by Statute, that if any alien came through the realme in pilgrimage and died, that all his goods should be forfeite, that law should be against conscience, for there is no cause reasonable why the sayd goodes should bee forfeite: And no more mee thinketh there is of wreche. S. There be diuers cases where a mā shal lose his goods & no default in him; As wher brass dray away from a man and they bee taken by and proclaimed and the owner hath not heard of them within the yeere and the day, though bee made sufficient diligence to haue heard of them, yet the goods be forfeit and no default in him, and so it is where a man killeth an other with the sword of I. at Stille, the sword shall be forfeit as a Deodand, & yet no default is in the owner, and so me thinketh it may be in this case, and that Arth the common lawe before the said Statute was that the goods wreched vpon the sea shall be forfeit to the King, that they bee also forfeit now after the Statute, except they be saued by following the Statute, for the Law must needs reduce the propriety of al goods to some man, and when the goodes be wreched, it seemeth the propriety is in no man, but admit that the propriety remaine still in the owner, then if the owner percase would neuer claime, then it should not bee knowne who ought to take them: and so might they bee destroyed and no profit come of them, wherfore me thinketh it reasonable that the Law shall appoint who ought to haue them and that hath the lawe appointed to the King as Soueraigne and head

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ouer the people. D. In the cases that thou hast put before of the Strap and Decodand, there bee considerations why they bee forsaite, but it is not so here, and mee thinketh that in this case it were not unreasonable that the Law would suffer any man that would take them, to take and keepe them to the vse of the owner, sauing his reasonable expences, and this me thinketh were moze reasonable law then to pull the propertie out of the owner without cause. But if a man in the Sea cast his goods out of the ship as forsaie, there Doctors hold that euery man may take them lawfully that will: But otherwise it is as they say if hee throw them out for feare that they should ouercharge the ship.

S. There is no such Law in this Realme of goods forsaiken; for though a man wrecue the possession of his goods and sayth hee forsaiketh them, yet by the Lawe of the Realme the propertie remaineth still in him, and hee may seise them after when he wil; And if any man in the meane time put the goodes in safeguard to the vse of the owner, I thinke hee doth lawfully, and that he shall be allowed for his reasonable expences in that behalfe, as he shal be of goods found, but hee shall haue no propertie in them no moze then in goodes found. And I would agree that if a man prescribe, that if he find any goodes within his manor that hee should haue them as his owne, that that prescription were holde, for there is no consideration howe the prescription might haue a lawfull beginning, but in this case me thinketh there is. D. What is that? S. It is this, The King of the olde custome

The 52. Chapter.

Some of the realme, as the Lord of the narrow sea is bound as it is said to scour the Sea of the Pirats & petit robbers of the sea. And so it is read of the noble King Saint Edgare, & hee would wisely in the yere scour the sea of such pirates, but I meane not thereby that the King is bound to conduct his Marchants vpon the sea against all outward enemies, but that he is bound onely to put away such pyrates and petit robbers. And because that cannot be done without great charge, it is not vnreasonable if he haue such goods as bee wreched vpon the Sea toward the charge. D. Vpon that reason I will take a respite till an other time.

¶ The v. question of the Doctour, whether it stand with conscience to prohibite a Iurie of meat and drink till they be agreed.

Cap. 52.

If one of the xii. men of an enquest know the very truth of his owne knowledge, and instructeth his fellows therof, & they will in no wise giue credence to him, & thereupon because meat & drinke is prohibited them, he is drituen to that point that either he must assent to them, and giue their verdict against his own knowledge and against his owne conscience, or dye for lacke of meat. how may the law then stand with conscience that will dritue an innocent to that extremity, to be either forsworne or to bee famished & dye for lacke of meate. S. I take not the law of the realme to be, that the Jury after they

they be swozne may not eate nor drinke till they be agreed of the verdict, but truth it is there is a Maxime, and an old custome in the law, that they shall not eate nor drinke after they bee swozne till they haue giuen their verdict without the assent and licence of the Iustices, & that is ordeined by the law for eschewing of diuers inconueniencies that might follow thereupon, and that specially if they should eat or drinke at the costes of the parties, and therefore if they do the contrary, it may be layed in arrest of the iudgement: But with the assent of the Iustices they may both eat and drinke; As if any of the Iuroys fall sicke before they bee agreed of their verdict so sore that hee may not common of the verdict, then by the assent of the Iustices he may haue meat & drinke, and also such other thinges as bee necessarie for him and his fellows also at their owne costes, or at the indifferent costes of the parties if they so agree, or by the assent of the Iustices may both eat & drinke: and therefore if the case happen that thou now speakest of, and that the Iurie can in no wise agree in their verdict, and that appeareth to the Iustices by examination, the Iustices may in that case suffer them to haue both meate and drinke for a time to see whether they will agree, and if they wil in no wise agree, I think that the Iustices may set such order in this matter as shall seeme to them by their discretion to stand with reason and conscience, by awarding of a new Enquest, & by setting fine vpon them that they shall stand in default, or otherwise as they shall think best by their discretion, like
as

The 53. Chapter.

as they may doe if one of the Jurie dye before verdict, or if any other like casualities fall in that behalfe. But what the Iustices ought to doe in this case that thou hast put by in their discretion, I will not treat of at this time.

¶ The 6. question of the Doctor, whether the colors that be giuen at the common law in Alsises, actions of trespass, & diuers other actions, stand with conscience, because they be most commonly feyned, and be not true.

Cap. 53.

I pray thee let me heare thy mind to what intent such colors bee giuen, and such they bee commonly vntue, how they may stand with conscience? S. The cause why such colors bee giuen in this, there is a Maxime and a ground of the Lawe of England, that if the defendant or tenant in any action plead a plea that amounteth to the generall issue, that he shall be compelled to the generall issue, and if hee will not, hee shall be condemned for lacke of answer, & the general issue in Alsise is, that he that is named the disseisor hath done no wrong, nor no disseisin. And in a writ of Entry in the nature of Alsise the generall issue is, that hee disseised him not. And in an action of Trespas that he is not guilty. & so euery action hath his generall issue assigned by the Lawe, and the tenant must of necessity either take the generall issue, or plead some plea in abatement of the writ, to the turisdiction, to the partie, or els some barre or some matter by way of conclusion. And therefore if

J.

I. at **H.** infesse **H.** Hart of land, and a stranger bringeth an assise against the said **H.** Hart, for the land whose title he knoweth not; In this case if he should be compelled to pleade to the point of the assise, that is to say, that he hath done no wrong ne no disseisin, the matter should be put in the mouths of 12. lay men, which hee not learned in the law, and therefore better it is that the Law be so ordered, that it be put in the determination of the Judges, then of lay men. And if the said **H.** Hart in the case before rehearsed, would plede in barre of the Assise that **Jo.** at **Stile** was seised and enfeoffed him, by force whereof he entred and asked iudgement, if that Assise should lye against him, that plee were not good, for it amounteth but to the generall issue, and therefore he shalbe compelled to take the generall issue, or els the Assise shall be awarded against him for lacke of answer. And therefore to the intent the matter may be shewed and pleaded before the Judges, rather then before the Jury, the tenantes vse to giue the plaintiffe a colour, that is to say, a colour of action whereby it shall appeare that it were hurtful to the tenant to put that matter that he pledeth to the iudgment of xii. mē, & the most common colour that is vsed in such case is this, when he hath pleaded that such a man enfeoffed him, as before appeareth, it is vsed that he shal plede farther, & say that the plaintiffe clayinging by a colour of a deed of feoffment made by the sayd feoffor, before the feoffment made to him, where no right passed by the deed, entered, vpon whom he entred and asked Iudgement is the

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the Iſſue lye againſt him. In this caſe becauſe it appeareth to bee a doubt to vnlearned men whether the land paſſe by the deed without liuerie or not, therefore the lawe ſuffereth the tenant to haue that ſpeciall matter to bring the matter to the determination of the Judges. And in ſuch caſe the Judges may not put the tenant from the plea, for they knowe not as Judges, but that it is true, & ſo if any default be, it is in the tenant & not in the Court. And though the truth bee, that there were no ſuch deed of feoffment made to the plaintife as the tenant pleadeth, yet he thinketh there is no default in the tenant, for he doth it to a good intent as befoze appeareth. D. If the tenant know that the feoffor made no ſuch deed of feoffment to the plaintife, then there is a defaulte in the tenant to pleade it, for hee wittingly ſayeth againſt the truth, and it is holden by al Doctozs that euery lye is an offence moze or leſſe, for if it be of malice, and to the hurt of his neighbour, then it is called *Mendacium pernitioſum*, & that is deadly Sinne. And if it bee in ſpozt, and to the hurt of no man, nor of cuſtome vſed, ne of pleaſure that he hath in lying, then it is veniall Sin, and is called in latin, *mendacium iocoſum*. And if it be to the profit of his neighbour and to the hurt of no man, then it is alſo veniall Sinne, and it is called in latin, *mendacium officioſum*. And though it be the leaſt of thoſe thre, yet it is a veniall Sinne and would be eſchewed. Sc. Though the midwives of A Egypt lped when they had reſerued the male children of the Hebrews, ſaying to the King Pharaos, that the

the Hebrewes had women that were cunning in the same crafte, which oz they came had reserved the children alive, where in deede they themselves of pity and of dread of God reserved them, yet Saint Hierome expounded the text following, which sayeth that our Lorde therfore gaue them houses, that is to be understood, that hee gaue them spirituall houses and that they had therfore eternall rewardes, and if they sinned by that lye, although it were but veniall, yet I cannot see howe they should haue therfore eternall reward. And also if a man intending to slea an other, aske me where that man is, is it not better for me to lye and say I cannot tell where hee is, though I know it, then to shewe where hee is, whereupon murther should followe? Doct. The deed that the Midwives of AEgypt did in saving the children, was meritorious and deserved reward everlasting (if they beleued in God) & did good deedes beside, as it is to suppose they did, when they for the love of God, refused the death of the Innocents, and then though they made a lye after, which was but veniall sinne, that could not take from them their reward, for a veniall sinne doth not utterly extinct charitie, but letteth the seruour thereof, and therfore it may well stande with the wordes of Saint Hierome, that they had for their good deed eternall houses, and yet the lye that they made to be a veniall sinne: but neuertheless, if such a lye that is of it selfe but venial. be affirmed with an oth, it is alway mortal, if he knew it be false that he sweareth. And as to the other
ques

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question it is not like to this question that we haue in hand as me seemeth, for sometime a mā for eschewing of the greater euill may doe a lesse euill, and then the lesse is no offence in him, and so it is in the case that thou hast put, wherein because it is lesse offence to say, hee worteth not where he is, though he know where he is, then it is to shewe where hee is, whereupon murder should follow, it is therefore no sinne to say he worteth not where hee is, for every man is bound to loue his neighbour, and if he shewe in this case where hee is, knowing his death should follow thereupon, it seemeth that he loued him not, ne that hee did not to him as he would be done to: But in the case that wee be in here, there is no such Anne eschewed; for though the partie pleadeth the generall issue, the Jury might finde the truth in euery thing, and therefore in that he saith that the plaintife claiming in by the coloꝝ of a deed of feoffment, where nought passed, entered &c. knowing that there was no such feoffment, it was a lye in him and a veniall Anne, as me thinketh. And euery man is bounde to suffer a deadly Anne in his neighbour, rather then a veniall Anne in himselfe.

S. Though þe Jury by þe a general issue, may finde the truth as thou sapest, yet it is much moze dangerous to the iury to inquire of many points, then to enquire onely of one point. And forasmuch as our Lord hath giue a cōmandement to euery man vpon his neighbour, therefore euery man is bound to force as much as in him is, þe by him no occasion of offence come to his

his neighbor. And for the same cause, the law hath
ordained diuers maxims & principles, where-
by issues in the kings court may be toynd by
one point in certaine as nigh as may bee, & not
generally, least offence might follow thereupon
against God, & a hurt also vnto the Jury, where-
fore it seemeth that he loueth not his neighbor
as himselfe, ne that he doth not as he would be
done to, that offereth such danger to his neigh-
bor, where he may well & conueniently keepe it
from him, if he will follow the order of the law,
& it seemeth that he putteth himselfe wilfully
in iopardy that doth it, & it is written Eccle. 3.
Qui amat periculum, in illo peribit; that is to
say, he that loueth perill, that perish in it, and he
that putteth his neighbor in perill to offend, puts
teth himselfe in the same, and so should he doe
me seemeth that would wilfully take the gene-
rall issue, where hee might conueniently haue
the speciall matter, and furthermore it is no of-
fence in princes and rulers to suffer contracts,
and buying and selling in markets and faires,
though both perjury and deceit will follow
thereupon, because such contracts be necessarie
for the common wealth, so it seemeth likewise,
that there is no default in the partie that pleads
such a speciall matter to auoide from his
neighbour the daunger of perjury, ne yet in the
court though they induce him to it, as they doe
sometime for the intent before rehearsed, and in
likewise some will say, that if rulers of cities and
communalities, sometime for the punishment of
felons, murderers, & such other offenders will
(to the intent they would haue them to con-
fess

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hesse the truth) say to them that bee suspected that they be informed of such certayne defaults, or misdemeanors in the offendours, & that they doe to the intent to haue them to confesse the truth, that though they were not so informed, that yet it is no offence to say they were so informed, because they do it for the common welth, for if offendours were suffered to go unpunished, the common wealth would efrsoone decay & utterly perish.

D. I wil take aduise ment vpon thy reason in this matter till an other seison, and I wil now aske thee an other question somewhat like vnto this. I pray thee let me heare thy minde therein. S. Let me heare thy question & I shall with good will say as I thinke therein.

¶ The 7. question of the Doctour concerning the pleading in Afsise, whereby the tenants vse sometime to plede in such maner that they shall confesse no Ouster.

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IT is commonly vsed as I haue heard say that when the tenant in Afsise pleadeth that a stranger was seysed and entroofed him, and giueth the plaintife a colour in such maner as before appeareth in the xlviii. Chapter, that the tenant many times when hee hath pleaded thus, and the plaintife clayming by a colour of a dede of feoffement made by the said stranger, where nought passed by the dede entred, and

and that then they vse to say further, vpon whom *J. B.* entred, vpon whom the tenaunt entred, where in deede the said *J. B.* neuer entred, ne happly there was neuer no such man: How cā this pleding be excused of an vnttruth, and what reasonable cause can be why such a pleding should bee suffered against the truth. *Sci.* The cause why that maner of pleding is suffered is this; If the tenant by his pleding confessed an immediate entry vpon the plaintife, or an immediate putting out of the plaintife, which in French is called an ouster, the if the title were after found for the plaintife, the tenant by his confession were attainted of the disseisin. And because it may be, that though the plaintife haue good title to the land, that yet the tenant is no disseisor; Therefore the tenants vse many time to plede in such maner as thou hast said before, to saue themselves from confessing of an Ouster, so if there be any default, it is not in the Court, ne in the Law, for they know not the truth therein till it be tryed, and me thinketh also that there is in this case right little default or none in the tenant nor in his counsaile, specially if the counsaile know that the tenant is no disseisor. But as to that point I pray thee that thou as thou hast taken a respite to bee aduised, or that thou shewe thy full minde in the question of a colour giuen in *Wise*, whereof mention is made in the said 48. Chapter: that I likewise may haue a like respite in this case till an other time, to bee aduised, and then I shall with good will shew thee my full minde therein.

¶ II.

D.

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D. I am content it be as thou saist, but I pray thee that I may yet adde an other question to the 2. questions befoze rehearsed of the colours in assise & feele thy minde therein, because that soundeth much to the same effect that the other doe (that is to say) to proue that there bee diuers things suffered in the law to be pleaded that be against the truth, & I pray thee let mee hereafter know thy mind in all thre questions, & thou shalt then with a good wil know mine.

Str. I pray thee shewe mee the case that thou speakest of. **Do.** If a man steale a horse secretly in the night, it is vsed that thereupon hee shalbe indicted at the Kings suit, and it is vsed that in that Indictment it shall bee supposed that hee such a day, and place with force and armes (that is to say) with staves swordes, and kniues &c. feloniously stole the horse agaynst the Kings peace, and that forme must bee kept in euery Indictment, though the felon had neither sword nor other weapō with him but that he came secretly without weapon. How can it therefore be excused, but that therein is an vntruth? **S.** It is not alleadged in the Indictment by matter in deede that he had such weapon, for the forme of an Indictment is this.

Inquiratur pro dño Rege, si A. tali die & Anno apud talem locum vi & armis, videlicet gladijs &c. talem equum talis hominis cepit &c.

And then if the twelue men be only charged with the effect of the bill; That is to say, whether he be guilty of the felony or not, and not whether he bee guiltie vnder such manner and forme as the bill specifileth or not, and so when they

they say *billa vera*, they say true as they take the effect of the bill to be. And therfore if there were false latin in the bill of Indictment, & the Jury saith *billa vera*, yet their verdict is true, for their verdict stretcheth not to the trueth or falsshod of the latine, but to the felony, ne to the forme of the words, but to the effect of the matter, & that is to inquire whether there were any such felony done by the person or not, and though the bill vary from the day, from the yere, and also from the place where the felonie was done in, so it vary not from the shire that the felony was done in, and the jury saith *billa vera*, they haue giue a true verdict, for they are bound by their oath to giue their verdict according to the effect of the bil and not according to the forme of the bill. And so is he bound by the lawe to that that by the lawe is the effect of his auow, and not onely to the words of his auow. And if a man auow neuer to eat white meate, yet in time of extreame necessity hee may eat white meat, rather then die & not break his auow, though he affirmed it with an oath, for by the effect of his auow, extreme necessity was excepted, though it were not expressely excepted in the words of the auow, & so likewise though the wordes of the bill bee to inquire whether such a man such a day and yere, and in such a place did such a felony, yet the effect of the bill is to inquire whether he did the felony within the shire, or no, & therefore the Iustices before whom such Indictmentes be taken, most commonly informe the Jury that they are bound to regard the effect of the bil and not the forme.

§ 19.

And

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And therefore there is no vntruth in this case
neither in him that made the bill, ne yet in the
Jury as me seemeth. D. But if the partie that
owed the horse bying an action of trespassse, and
declareth that the defendant tooke the horse wth
force and armes, where hee tooke him without
force and armes, how may the plaintife there
be excused of an vntruth. S. And if the plaintife
surmise an vntruth, what is that to the Court
or to the Law, for they must beleue the plain-
tife, til that that he saith be denyed by the defen-
dant. And yet as this case is, there is no vn-
truth in the plaintife to say hee tooke the horse
with force and armes, though he came neuer so
secretlie and without weapon, for euerie tres-
pas is in the law done with force and armes, so
that if he be attainted and found guilty of the
trespas, he is attainted of the force and armes:
And As the law adiudgeth euerie trespass to be
done with force, therefore the playntife sayth
truely that he tooke him with force as the law
meaneth to be force. For though he tooke the
horse as a felon, yet vpon the felonious taking
the owner may take an action of trespass if hee
will, for euerie felonie is a trespassse and more.
And so I haue shewed thee some part of my
minde to prooue that in those cases there is no
vntruth, neither in the parties, neither in the
Jurie, nor in the Lawe. Neuerthelesse, at
a better leasure I will shewe thee my minde
more fully therein with good will as thou hast
promised mee to doe in the cases of colours of
the Wisse, and of the ouster, that bee before re-
hearsed.

¶ The

¶ The viii. question of the Doctor, whether the
statute of xlv. of Edward the third.

Silua cedua stand with
conscience,

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In the xlv. yere of the raigne of Ed. 3. It was
enacted, that a prohibition should lie where a
man is impleaded in the court Christian, for
distines of wood of the age of xx. yere or above,
by the name of Silua cedua, how may that Sta-
tute stand with conscience that is so directly as-
gainst the libertie of the Church, and that is
made of such things as the parliament had no
authoritie to make any Lawe of? It appea-
reth in the said statute that it is enacted that a
Prohibition should lie in that case, as it had be-
sed to do before that time, and if the prohibition
lay by a prescription before the statute, why is
not then the Statute good as a confirmation of
that prescription. D. If there were such a pre-
scription before the Statute that prescription
was hope, for it prohibiteth the payment of
Tithes of trees of the age of xx. yere or above,
and payng of tithes is grounded aswell vpon
the law of God, as vpon the law of reason, and
against those laws lieth no prescription as it is
holde most commonly by al men. S. That there
was such a prescription before the said statute,
& that if a man before said statute had bin sued
in the spirituall court for tithes of wood of the
age of xx. yere or above, the prohibition lay, as

¶ iii.

appea:

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appeareth in the said Statute, and it cannot bee thought that a Statute that is made by authoritie of the whole realme, aswel of the king and of the Lords spiritual & temporall as of all the commons, wil recite a thing against þe truth: & furthermoze I cannot see how it can be grounded by the lawe of God, or by the law of reason that the x. part should be paid for tith and no other portion but that, but I thinke that it bee grounded vpon the Law of reason that a man should giue a reasonable portion of his goods temporal to them that minister to him thinges spiritual, for euery man is bound to honoꝝ god of his proper substance, and the giuing of such portion hath not bin only vsed among faithfull people, but also among vnfaithfull as it appeareth Gene. 47. where coꝝne was giuen to the priests in Egypt of chimon barnes. And S. Paul in his Epistles affirmeth þe same in many places, as in his first Epistle to the Corin. Cap. 9. where he saith, hee that worketh in the church, shall eate of that that belongeth to the Church; And in his Epistle to the Gal. Cap. 6. he saith; Let him that is instructed in spiritual things, depart of his goodes to him þe instructeth him. And S. Luke Cap. 10. saith; That the workman is worthe to haue his hire. All which sayings may right conueniently be taken and applyed to this purpose, that spirituall men which minister to the people spirituall things, ought for their ministration to haue a competent liuing of them that they minister vnto. But that the tenth part should be assigned for such a portio and neyther moze nor lesse, I cannot perceiue that

that that should bee grounded by the Lawe of reason, nor immediatly by the Lawe of God: for before the Lawe written there was no certaine portion assigned for the spirituall Ministers, neither the x. part, nor the xij. part, vnto the time of Iacob, for it appeareth Gene. 28. that Iacob auowed to pay Dismes which was among the Jewes for the x. part, if our Lord prospered him in his iourney, & if the x. part had bin due to him before that auow, it had bin in vaine to haue auowed it, and so it had if it had bin grounded by the Lawe of reason, and as to that is spoken in the Euangelistes, and in the new Lawe of Tithes, it belongeth rather to the giuing of tithes in the time of the olde law, then of the newe Lawe, as appeareth Mathew 23. and Luke 11. where our Lorde speaketh to the Pharises, saying; woe to you Pharises & tithes mints, rue, and herbes, & forget the iudgement and the charity of God, these it behoueth you to doe, and the other not to omit, that is to say, it behoueth you to doe Justice, and charitie of God, & not to omit paying of tithes though it be of small things as of mints, rue, herbes, and such other. And also that the Pharisee saith Luke. 17. I pay my tithes of all that I haue, it is to be referred to the olde Lawe not to the time of the new Lawe: Therefore as I take it that the paying of tithes, or of a certain portion to spirituall mē for their spiritual ministracion to the people hath bin grounded in diuers maners. First before the lawe written a certain portion sufficient for the spirituall Ministers was due to them by the Lawe of nature, which after

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after them that bee learned in the Lawe of the Realme is called the law of reason, & that por-
tion is due by all lawes. And in the Lawe writ-
ten, the Jewes were bounde to giue the x. part
to their priests aswell by the said auow of Ja-
cob, as by the law of God in the old Testamēt
called the Iudicials. And in the new Lawe the
paying of the x. part, is by a Lawe that is made
by the Church. And the reason wherefore the
x. part was ordeined by the church to be payed
for the tithes was this; There is no cause why
the people of the new lawe ought to pay lesse to
the ministers of the new lawe, then the people
of the old Testament gaue to the ministers of
the old Testament: For the people of the new
Lawe be bound to greater things then the peo-
ple of the old Lawe were, as it appeareth Math.
5. where it is said: vnlesse your good workes as
bound aboute the workes of the Scribes & the
Pharises, ye may not enter into the kingdome
of heauen. And the sacrifice of the old lawe was
not so honozable as the sacrifice of the newe
Lawe is: for the sacrifice of the old Lawe was
only the figure, and the sacrifice of the new lawe
is the thing that is figured, that was the sha-
dow, this is the truth. And therefore h Church
vpon that reasonable consideration ordeyned,
that the x. part should be payed for h sustentance
of the Ministers in the new Lawe, as it was
for the sustentance of the Ministers in the olde
lawe, & so that lawe with a cause may be increa-
sed or minished to more portion or to lesse as
shall be necessary for them. Do. It appeareth
Gen. 14. that Abraham gaue to Melchisedech
dismes,

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dismes, and that is taken to be the x. part, and
 that was long before the Law written, & there-
 fore it is to suppose that he did that by the Law
 of God. S. It appeareth not by any Scripture
 that he did that by the commandement of God,
 ne by any revelation: And therfore it is rather
 to suppose that hee did part of duety, & part of
 his owne free will, for in that he gaue the dis-
 mes as a reasonable portion for the sustentance
 of Melchisedech and his ministers, he did it by
 the commandement of the Lawe of reason, as
 before appeareth, but that he gaue the x. part,
 that was of his free will, & because he thought
 it sufficient & reasonable: but if he had thought
 the xii. part or the xiii. part had sufficed, hee
 might haue giuen it, and that with good con-
 science. And so I suppose that in the new law,
 the giuing of the x. part is by a Lawe of the
 Church, and not by the law of God, vnlesse it
 be taken that the law of the Church is the law
 of God, as it is sometime taken to bee, but not
 appropiatly nor immediatly, for that is taken
 appropiatly to be the law of God, that is con-
 tained in scripture, that is to say, in the old Tes-
 tament and in the New. D. It is somewhat
 dangerous to say that Tithes be grounded on-
 ly vpon the Law of the Church. for some men
 as it is said, say that mans Lawe bindeth not
 in conscience, & so they might happē to make a
 boldnesse therby to deny their tithes. S. I trust
 there be none of that opinion, & if there be it is
 great pity: And neuerthelesse they may be com-
 pelled in that case by the law of the Church to
 pay their tithes as wel as they should be if paying
 of

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of tithes were grounded meere ly vpon the law of God. D. I think well it be as thou saist, and therefore I hold me contented therein. But I pray thee shew me thy minde in this question. If a whole countrey prescribe to pay no tithes for cozne or hay, nor such other, whether thou thinke that that prescription is good. S. That question depēdeth much vpon that that is said before, for if paying of the x. part be by the law of reason, or by the law of God, the h. prescription is void, but if it be by the law of man, then it is a good prescription, so that the Ministers haue a sufficient portion beside. D. Iohn Gerſo which was a Doctor of diuinitie in a treatise that he named Regulæ morales, saith, that Dismes be paled to Priests by the law of God. S. The wordes that hee speaketh there of the matter be these; Solucio decimarū sacerdotibus, est de iure diuino quatenus inde sustentetur: sed quoad tñ hanc vel illā assignare, aut in alios redditus cōmutare positui iuris existit, that is thus much to say; The paying of dismes to priests, is of h. law of God, h. they may therby be sustented, but to assigne this portion or h. or to chāge it to other rents, that is by the law positue, & if it should bee taken that by that word, Decimarū, which in English is called dismes, or tithes, that hee ment the x. part, and that that x. part should be paid for tithe by the law of God, then is the sentence that followeth after against that saying, for as it appeareth aboue, the text saith afterward thus, but to assigne this portion or that, or to change it into other rents belongeth to the law positue, that is to the lawe of

of man, and if the x. part were assigned by god, then may not a lesse part be assigned by the law of man, for that should be contrary to the Law of God, & so it should be void. And mee thinketh that it is not likely that so famous a clarke would speake any sentence contrary to the law of God, or contrarie to that he had spoken before, & to proue he meant not by the terme Decimæ, that dismes should alway be take for the x. part, it appeareth in the 4. part of his works in the 32. title Literæ, where he saith thus; Non vocatur portio curatis debita propterea decimæ eo quod semper sit decima pars, immo est interdum vicesima aut tricesima: That is to say, the portio due to curats, is not therfore called dismes, for it is alway the x. part, for sometime it is the xx. or the xxx. part, and so it appeareth that by this word decimarū, he meant in the text before rehearsed a certain portio, & not precisely the x. part, and that the portio should be paid to Priests by the law of God to sustaine them with, taking as it seemeth the law of reason in that saying for the Law of God, as it may one way be well and conueniently taken: because the law of reason is given to every reasonable creature by God. And then it followeth pursuantly that it belongeth to the lawe of man to assigne this portio or that, as necessity shall require for their sustentance, and then his saying agreeth wel to that that is said before, that is to say, that a certaine portio is due for prestes, for their spirituall ministracion by the law of reason. And then it would follow thereupon that if it were ordained for a law that all

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paying of tithes should from hencefoorth cease, & that euery curate should haue assigned to him such certain portion of lãd, rent, or annuities, as should be sufficient for him, & for such ministers as should be necessary to be vnder him, according to the number of the people there, or that euery Parishioner or householder should giue a certain of money to that vse, I suppose the law were good, & that was y^e meaning of J. Gerson as it seemeth in his words before rehearsed: where he saith, but to chaunge tithes into other rents is by the law positive, that is to say, by the Law of man. And some thinke that if a whole Countrey prescribe to bee quite of both tithes of coyne or grasse, so that the spirituall Ministers haue a sufficient portion beside to liue vpon, that is a good prescription & y^e they should not offend, that in such countries payed no tithes: for it were hard to say, that all the men of Italy, or of the East partes bee damned because they pay no tithes, but a certaine portion after the custome: therefore certaine it is to pay such a certaine portion, as wel they as all other be bound, if the church aske it, any custome notwithstanding. But if the Church aske it not, it seemeth that by that not asking, the church remitteth it, & an example therof we may take of the Apostle Paul, that though he might haue taken his necessary liuing of them that he preached to, yet he tooke it not, & neuertheless they that gaue it him not, did not offend because he did not aske it, but if one man in a town would prescribe to be discharged of tithes of coyne & grasse, me thinketh the prescription

is

is not good, vnles he can proue \S he recompens-
 ceith it in an other thing: for it seemeth not rea-
 sonable that hee should pay lesse for his tithes
 then his neighbors do, seeing that the spiritual
 ministers are bound to take asmuch diligence for
 him, as they be for any other of \S parish, wher-
 fore it might stand with reason \S he should bee
 compelled to pay his tiths as his neighbors do,
 vnles he can proue that he payeth in recompence
 thereof more then the x. part in an other thing.
 Nevertheless I leaue the matter to \S iudgment
 of other, & then for a further prooue though the
 said prescription of not paying tithes for trees
 of xx yere & aboue, were not good, yet that that
 of corn & grasse should be good, some make this
 reason: they say \S there is no tith but it is either
 a predial tith, or a parsonal tith, or a mixt tith,
 & they say \S if a tith should be paid of trees whē
 they be solde, that the tith were not a prediall
 tith, for the predial tith of trees is of such trees
 as bring forth fruits & increase perely, as apple
 trees, nut trees, pearre trees, & such other, wher-
 of the predial tith is the appels, nuts, pearres, &
 such other fruits as come of the perely, & when
 the fruites bee tithed, if the owner after sell the
 trees, there is no tith due therby, for two tithes
 may not be paid of one thing, & of those tithes, \S
 is to say, of predial tiths was \S commandemēt
 giuen in the old Law to the Jewes, as appea-
 reth Leuit. 27. where it is said, Omnes decimar
 terræ, siue de pomis arborum, siue de frugibus,
 domini sunt, & illi sanctificantur, \S is to say, all
 tiths of the earth either of appels of trees, or of
 grains be our Lords, & to him they be satisfied,
 and

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and though the sayd law speaketh onely of apples, yet it is understood of al maner of fruits. And because it saith that all the tythes of the earth be our Lordes, therefore calves, lambs, and such other must also be tythed, and they be called by some men prediall tythes, that is to say, tythes that come of the grounde, howbeit they call the only Predials mediate, and they be the same tythes that in this writing bee called mixt tythes, and the other tythes (that is to say) tythes of apples & cozne, & such other be called Predials immediate, for they come immediatlie of the ground, and so do not mixt tyths, as evidently appeareth. D. But what thinkest thou shall bee the prediall tythes of ashes, elmes, sallows, alders, and such other trees as beare no fruites, whereof any profit commeth, why shall not the x. part of the selfe thing bee the tythe therefore if they be cut downe aswell as it is of cozne and grasse? St. For I think that there is to that intent great diuersitie betweene cozne, grasse, and trees, and that for diuers considerations, wherof one is this: The property of corn & grasse is not to grow ouer one pere, and if it doe, it will perishe and come to nought, and so the cutting downe of it, is the perfection and preservation thereof, and the speciall cause that any increase followeth of the same; And therefore the tenth part of the increase shal be payed as a prediall tythe, and there no deduction shal be made for the charges of it: And so it is of sheepe and beastes that must be taken and killed in time, for else they may perishe and come to naught: but when trees bee felled, that felling is

is not the perfection of the trees, ne it causeth not them to increase but to decay; For most commonly the trees would bee better if they might grow still. And therefore vpon that that is the cause of the decay and destruction of the it semeth there can no pzedial tithe arise, & some men say that this was the cause why our Lord in the said Chapter of Leuiti. 17. gaue no commaundement to tithe the trees, but the fruites of the trees onely. D. It appeareth in Paralip. 31. that the Jewes in the time of the King Ezechias offered in the Temple all thinges that the ground brought forth, and that was trees as well as corne & grasse. S. It appeareth not that they did that by the commaundement of God, and therefore it is like that they did it of their owne deuotion and of a fauour that they had aboue their duetie to the repairing of the Temple, which the king Ezechias had then commaunded to bee repaired; And so that text prometh nothing that tithes shoulde bee payed for trees: And therefore they say farther, that truth it is, that if a man to the intent hee would pay no tithes, would wilfully suffer his corne and grasse to stand still and to perishe, he shoulde offend conscience thereby: but though hee suffer his trees to stand still continually without selling, because he thinketh a tithes would bee asked, if he sold them (so that he doe it not of an euill will of the Curate) hee offendeth not in conscience, ne hee is not bounde to restitution therefore, as he shoulde be if it were of corne and grasse, as before appeareth: And an other diuersity is this; In this case of tithes wood, that

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tithes

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tythe, thereof would serue so little to that purpose that tythes be paid for, that it is not likely that they that made the Lawe for payment of tythes intended that any tythe should bee paid for trees or wood; For the spirituall ministers must of necessitie spend daily and weekly, and therefore the tythes of trees or wood that cometh so seldome would serue so little to the purpose that it should be paid for, that it would not helpe them in their necessitie; So that if they should bee driven to trust thereto, though it might helpe him in whose time it should happen to fall, yet it should deceiue them that trusted to it in the meane time, and also shoulde leaue the Parish without any to Minister to them. D. I would wel agree that for trees that beare fruit there should no prediall tith be paid when they be sold (for the prediall tith of them is the fruits that come of them) and so there cannot be two predials of one thing, as thou hast sayde. But of other trees that beare no fruit, me thinketh that a prediall tith shoulde be paid when they be solde, and so it appeareth that there ought to bee by the constitution provinciall made by the reuerend Father in God Robert Wilchelsie late Archbisshop of Canturburie, where it is said and declared, that Silua cedua is of euery kind of trees that haue beting in that that they should be cut, or that be able to be cut, whereof we will, saith hee, that the possessor of the said woods be compelled by the censures of the Church to paie to the Parithe Church, or mother Church, the tith as a reall or prediall tith; And so by vertue of that constitution

stitution provincial a pzedial tithe must be paid of such trees as haue no fruite : For I would wel agree that the said constitution provincial stretcheth not to trees þe beare fruite as though þe woods be general for all trees (as before appeared.) Sr. I take not the reason why a pzedial tithe should not be paid for trees that beare fruit to be, because two pzediall tithes cannot be paid for one thing : for when the tithe is paid of Lambes, yet shall tithe be payed of wooll of the same sheepe (for it is paid for an other increase) and so it may bee said that the fruite of a tree is one increase, and the selling an other: But I take the cause to be for the two causes before reherfed, & also forasmuch as the selling is not properly an increase of the trees but a destruction of the trees, as it is said before. And farther I would heare the mind vpon the said constitution provinciall, which will, that tithes should be paid for trees by the possessors of the wood, that if the possessor sell the wood for C. li. and giue the buyer a certain time to sell it in, what tithe shall the possessor pay as long as the wood standeth? D. I thinke none, for the pzedial tithes commeth not til the wood bee felled, and a parsonall tithe he cannot pay, no more then if a man plucke downe his house and selleth it, or if he sell al his land, in which cases I agree well he shall pay no tithe neither parsonall nor pzediall. S. And then I put case that the buyer selleth the wood againe as it is standing vpon the ground to an other for CC. li. what tithe shall be payed then? Doct. Then the first buyer shall pay tithe of the surplusage that

p ii. he

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he taketh ouer the C. li. that he paid as a Parsonall Tithe. S. And then if the second buyer after that cutte it downe and sell it when it is cut downe for lesse then he paid, what tithe shal then be payde?

D. Then shal he that sellerh them pay ½ tithe for the trees as a prediall tithe. S. I cannot see how that can be, for hee neyther hath the trees, that the prediall tithe should be paid for, if any ought to be paid, nor he is not possessour of the ground where the trees growe: And therefore if any prediall tithe should be paid, it should be payde eyther by the first possessour by reason of the wordes of the sayd constitution prouincial, which be, that the tithe shall be paid by the possessour of the wood, or by the last buyer, because he hath the trees that should bee tithed, and by the first possessour the tithe cannot be payed as a prediall, for hee cut them not downe, ne they were not cut downe vpon his bargainne, and by the last buyer it cannot be paid neither as a prediall tithe; For the said constitution saith, that the possessor of the woods should be compelled to pay it. And therefore I suppose that the trowth is, that in that case no tythe shall bee payed, for as to the last seller, hee shall paie no parsonall tithe, for he gained nothing, as it appeareth before, and no prediall tythe shall bee paid, for it should be against the sayde prescription, and also the cutting downe is the destruction of trees and not their preservation, as is said before.

D. Then takest thou the said constitution to be of final effect, as it seemeth, S. I take it to be of

of this effect, that of wood about twenty yeare it bindeth not, because it is contrary to the common law, and to the said prescription. that standeth good in the common law: but of wood under xx. yere wherof tith have been accustomed to be payed, the constitution is not against the said prescription, because paying of tith under xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Lawe tithes should not be paid for wood under xx. yere, no more then for about xx. yere, and that Prohibition in that case lyeth by the common lawe; Nevertheless, because it hath bin suffered to the contrary, and that in many places tith have bin paid thereof, I passe it over, but where tith have not bin paid of wood under xx. yeare; I thinke none ought to be paid at this day in law nor conscience: But admit, that the sayde constitution taketh effect for payment of the wood under xx. yeares as of a prediall tith, yet I cannot see howe the tith thereof should be payed by the possessor of the wood, if hee sell them, but that it should be paid rather by him that have the trees, for the constitution is, that the tith shall be paid as a real or a prediall tith, and that is the tenth part of the same trees, as it is of coyn. And if a man buy coyn upon the ground the buyer shall pay the tith and not the seller, and so it should seeme to be here, and what the constitution meant to decree the contrary in tith wood, I cannot tell, unless the meaning were to induce the owners to pay tithes of great trees when they sell them to theyr owne use:

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which

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which mee thinketh shoulde bee very harde to stand with reason, though the said Statut had neuer bin made, as I haue sayd befoze. And furthermoze I would here (vnder correction) moue one thing, & that is this; That as it seemeth that they that were at the making of the sayde constitution knewe the sayd prescription did not followe the direct order of charite there in so perfectly as they might haue done; For when they made the saide constitution prouincial directly against the said prescription, they set Lawe against custome, and power against power, and in maner the spiritualtie against the temporaltie, whereby they might wel knowe that great variance & suit shoulde followe; And therefore if they had cleerly seene that the said prescription had bene against conscience they should first haue moued the king and his counsell & the nobles of the realme to haue assented to the reformation of that prescription, and not to make a law as it were by authoritie & power against the prescription, and then to threate the people & make them beleue that they were all accursed that kept the sayde prescription or maintayned it. And it seemeth to stand hardly with conscience to repute so many to stand accursed for following of the sayde statute and of the said prescription as there doe, and yet to do no moze then hath bin done to bring them out of it. Do. mee thinketh that it is not conuenient that lay mē should argue the lawes and the decrees or constitutions of the Church, and therefore it were better for them to giue credence to spiritual rulers that haue cure of theyr soules

soules then to trust to their own opinions, and if they would doe so, then such matters would much the more rather cesse then they will go by such reasonings. S. In that that belongeth to the articles of the faith, I thinke the people be bound to beleue the Church, for the Church gathered together in the holy ghost cannot erre in such things as belong to the Catholike faith; But where the church maketh any lawes whereby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes bindeth them or not, for in such lawes the Church may erre and bee deceiued, and deceiue other, eyther for singularitie, or for couettise or some other cause, and for that consideration it pertaineth most to them that bee learned in the Lawe of the realme to know such Lawes of the Church, as treat of the ordering of lands or goods & to see whether they may stande with the lawes of the realme or not: And therefore it is necessarie for them to knowe the Lawes of the Church that treat of Dismes, of executoys, of testaments, of legacies, ballardie, matrimony, and diuers other, wherein they be bound to knowe when the lawe of the Church must bee followed, and when the law of the Realme, whereof because it is not our purpose to treat, I leaue to speake any more at this time, and will resort againe to speake of Tythes, wherein some men say that of Tyme, Cole and Lead, no tithes shoulde be paid when they be solde by the owner of the ground, because it is part of the inheritance,

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and it is moze rather a destruction of the inheritance then an encrease; And therefore they say, that if a man take a Tynne worke, & giue the Lord the tenth dish according to the custome that the Lord shall pay no tith of that tenth dish neither prediall nor personall, but if the other that taketh the worke haue gaires & aduantage by the work, it seemeth that it were not against reason that hee should pay a parsonall tith of his gaires, the charge deducted. D. I pray thee he wince first what thou takest for a personall tith, and vpon what ground parsonall tiths be paid as thou thinkest so that one of vs mistake not an other therein S. I wil with good wil and therefore thou shalt vnderstand that is I take it, personall tiths be not paid for any increase of the ground, but for such profit as cometh by the labour or industrie of the Person, as by buying and selling and such other, and such personall tiths, as I take it, must be ordered after the custome, and the Church hath not vsed to leaue those tithes of compulsion but by conscience of the parties: Nevertheless Raymond saith that it is good to pay parsonall tiths, or with the assent of the parson, or distribute the to poore men, or els to pay a certain portion for the whole. But as Innocent saith, where the custome is, that they should be payed, the people be bound to pay them as well as predials, the expences deduct, Howbeit in the Church of England they vse to sue for such parsonall tiths as well as for predials, & that is by reason of the constitution prouinciall that was made by Robert Winchelsie;

chellie; By the which it was ordayned that parsonall tithes should bee payed of craftis and Marchandize, and of the lucre of buying and selling, and in likewise of Carpenters, Smiths, Weauers, Masons, and all other that worke for hire, that they shall pay tithes of their hyre, except they will giue any thing certaine to the vse, or to the light of the Church, if it so please the Parson; And in an other place the sayde Archbischoppe sayth, that of the pawnsage of woodes, and such other thinges ec. and of fishinges, trees, bees, doves, and of diuers other things there remembred, and of craftes, and of buying and selling of the profits of diuers other thinges there recued, euery man should helpe satisfie competentlie in the Church, to the which they bee bound to giue it of right, no expences by the giuing of the sayde tithes deducted or withholden, but onely for the payment of tithes of craftis and of buying and selling: And by reason of the sayde constitutions prouincials, sometimes suites bee taken in the Spirituall Court for parsonal tithes, and therof many men do maruaile, because deductions many times must bee referred to the conscience of the parties. And they maruaile also why a Law should be made in this Realme for paying of Parsonal tithes, more then there is in other Countreies. And heere I would gladly mooue thee farther in one thing concerning such parsonall tithes to know thy mind therein, and that is; If a man giue to an other a horse, and hee selleth that horse for a certayne summe, shall hee pay any tith of that summe?

D. What

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Do. What thinkest thou therein? St. I thinke
that he shall pay no tithes; For there as I take
it the profite commeth not to him by his owne
industrie, but by the gift of an other, and as I
take it, parsonall tithes be not paid for euery
profit or aduantage that commeth netwile to a
man, except it come by his owne industrie or
labour, and so it doth not heere. And also if he
should pay tithes of that hee solde the horse for,
he should paie tithes for the very whole value of
the thing. And as I take it, the parsonal tithes
for buying and selling shall neuer be paid for
the value of the thing, but for the cleere games
of the thing; And therefore I take the cases
before rehearsed, where a man selleth his land,
or pulleth downe a house, and selleth the stufte,
that he should there pay no tithes, that it is there
to be vnderstood that hee hath not lād or house
by gift or by discent: For if a man buy land, or
buy timber and stufte of a house, and sell it for
a gaine, I suppose that hee should pay a parso-
nall tithes for that gaine. And this case is not
like to a fee or annuitie granted for counsaile,
where the whole fee shal be tithed for the char-
ges deducted, or some certaine summe for it by
agreement, for there the whole fee commeth for
his counsaile, which is by his owne industrie.
But in the other case it is not so, and the same
reason as for the parsonal tithes might be made
of trees, when they discent or bee giuen to any
man, and hee selleth them to an other, that hee
shall pay no parsonall tithes. Do. We thinke
that if the horse amende in his keeping, & then
he sell the horse, that then the tithes shalbe paid
of

of that, that the hoise hath increased in value after the gift, and so it may bee of trees, that he shall pay tith of that, that the trees may bee amended after the gift or discent. **St.** Then the tithe must bee the x. part of the increase the expences deducted, and then of trees the charges must also bee deducted, for it is then a parsonall tithe, and there is no tree that is so much worth as it hath hurt the ground by the growing: therefore there can no parsonall tithe be payed by the owner of the ground when he selleth them, though they have increased in this time. **Nevertheless** I will speake no farther of that matter at this time, but will shewe thee, that if **Tinne, Lead, Cole,** or trees be sold, that a mixt tithe cannot grow thereby; For a mixt tithe is properly of Calves, Lambes, Pigges, and such other that come part of the ground that they bee fedde of, and part of the keeping, industrie, and oversight of the owners, as it is said before: but **Tinne, Leade, and Cole** are part of the ground and of the freehold, & trees grow of themselves, and be also annexed to the freehold, and wil grow of them selves, and also the mixt tithe must bee paid yeerely at certaine times appointed by the Lawe or by custome of the countrey, but it may happen that **Tinne, lead, cole,** & trees, shal not be selled nor taken in many yerres, & so it seemeth it cannot be any mixt tithe, & these be some of the reasons, which they would maintaine by Statute & prescription to be good, make to proue their intēt as they thinke.

D. What thinke they, if a man sell h lops of his wood, whether any tith ought there to be paid?

S. They

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S. They thinke all one law of the trees and of the loppes. D. And if he wile to fell the lops once in xii. or xvi. yeere, what holde they then? S. That is all one. D. And what is the reason why they ought not bee payed there aswell as for wood vnder xx. yeare? S. For they say, that the loppes are to be taken of the same condition as the trees bee what time soeuer they be felled, and that no custome will serue in that case against the statute, no more then it should doe of great trees. Do. And what hold they of the barke of the trees? Scu. Thereto I haue not heard of their opinion, but it seemeth to be one Lawe of the loppes. Doct. I perceiue wel by that thou hast sayde before, that thy minde is, that if a whole Countrey prescribe to bee quite of tithes of trees, cozne. and grasse, or of any other tiths, that that prescription is good, so that the spirituall ministers haue sufficient beside to liue vpon, dost thou not meane so? S. Yes verilie. D. And then I would know thy minde if any man contrary to that prescription were sued in the Spirituall Court for cozne and grasse, or any other tithes, whether a Prohibition should lye in that case, as it did after thy minde before the sayd Statute, where a man was sued in the Spirituall Court for tithes wood.

S. I thinke nay. D. And why not there, as well as it did where a man was sued for the tithes wood? S. For as I take it, there is great diuersitie betweene the cases, and that for this cause; There is a Maxime in the law of England, that if any suit be taken in the Spirituall court

court, wherby any goods or landes might bee recovered, which after the grounds of the Lawe of the Realme ought not to bee sued, there though percase the Kings Court shal hold no plee thereof, that yet a Prohibition should lie, and after when it had continued long that no tythes were paid of wood, because of the said prohibition, and that after by processe of time some Curats began to aske Tythes of wood, contrary to the Lawe and contrary to the sayde prescription, so that variance began to rise betweene Curats and their Parishoners in that behalfe, then for appeasing of the said variance the said Statute was made, and that as it seemeth more at the calling on of the Spirituall then of the Temporall; for the Statute doth not expressely graunt that the Prohibition in that case of tythe wood should lye so largely as some say it late by the Law: Howbeit, it doth not restraine the common Lawe therein, as it appeareth evidently by the words of the Statute, and so after some men it appeareth before the Statute, and also after the Statute (as I haue touched before) that the spirituall Court ought not in that case to haue made any processe for tythe wood: and therefore if they did, a Prohibition lay by the common Law. And like law is if the spirituall court make processe vpon such a Legacy as by the Law of the Realme is void. As if a man bequeth to one an other mans horse, & the spirituall court thereupon maketh Processe to execute that legacy, there a Prohibition lyeth; for it appeareth evidently in the libell, if all the truth appeare in the libell that

in

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in the law of the Realme the legacy is boide to all intntes: And that he to whom the legacy is made, shal neither haue the horse nor the value of the horse. And in likewise if a man sell his land for C.li. and he is sued after in the spirituall court for tithe of the said C.li. There a Prohibitio shal lie, for it appeareth in that case openly in the libell that no tith ought to be paid, and that the Spirituall law ought not in that case to make any processe whereby the goods of him that sold the land might be takē from him against the Lawe of the Realme. And vpon this grounde it is, that if a man were sued in the Spirituall court, now vith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that vith the statute there ought no suit to be taken for Mortuaries, and the same Lawe is, if any suit were taken in the Spirituall court for a new duty that is of late taken in some places vpon leases of Parsonages and vicarages, which is called a Dimissio noble, for it appeareth evidently in the libell if any be made therevpon, that no such processe ought by the law of the Realme to be made in that behalfe. But in the case of tithe coyne or grasse, or such other thinges, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suite thereof of right appertaineth to the Spirituall law, and so for any thing that appeareth, the partie may be holpen in the Spirituall Court by the prescription: And if the case were so farre put that in the Spirituall Court they would not allowe the said prescription, yet I thinke no

pro:

prohibition should lie; For though the spiritual
all iudges in a spirituall matter denie the par-
ties of Justice, yet the kings laws cannot re-
foune that, but must remitt it to their consci-
ence: But if there were some remedy provided
in that case, it were well done; For some men
say that in the spirituall Court they will admit
no plea against tithes. And also if a composition
were made by assent of the Patron and also of
the Ordinarie betweene a Parson & one of his
partitioners, that the Parson & his successors
should haue for a certain ground so many quar-
ters of cozne for his tithes perely, & after contra-
rie to the composition the Parson in the spiri-
tuall Court asketh the tithes as they fall, that
in this case no Prohibition should lye, ne yet
though the case were further put that the com-
position were pleaded in the Court & were dis-
allowed, but all resteth in the conscience of the
Judge spiritual (as is saide before.) Howbeit
because some bee of opinion that a Prohibition
should lye in this last case, therefore I will re-
fer it to the iudgment of other: But in the case
of prescription, before rehearsed, I take it for
the cleerer case, that no Prohibition should lie as
I haue said before. And I beseech our Lord
that this matter & such other like thereto, may
be so charitably looked vpon, that there be not
hereafter such diuisions ne such diuersities of
opinions therein, as hath bin in time past, wher-
by hath folloved great costes and charges to
many persons in this Realm; And that hath
moued me to speake so farre in this Chapter,
and in diuers other Chapters in this present
booke

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booke as I haue done; Not intending thereby to giue occasion to any person to withhold his tithes that of right ought to be payed, ne to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to be payed, and by none other. And that it may also somewhat appeare that the saide Statute of 45. Ed. 3. was well and lawfully made and vpon a good reasonable consideration, and that the sayde prescription is good also, so that no man was in any daunger of excommunication for the making of the sayd Statute, nor yet is not for the obseruing thereof, ne yet of the said prescription as it is noted by some persons that they should be. And thus I commit thee vnto our Lord, who euer haue both thee and mee in his blessed keeping euerlastingly. Amen.



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